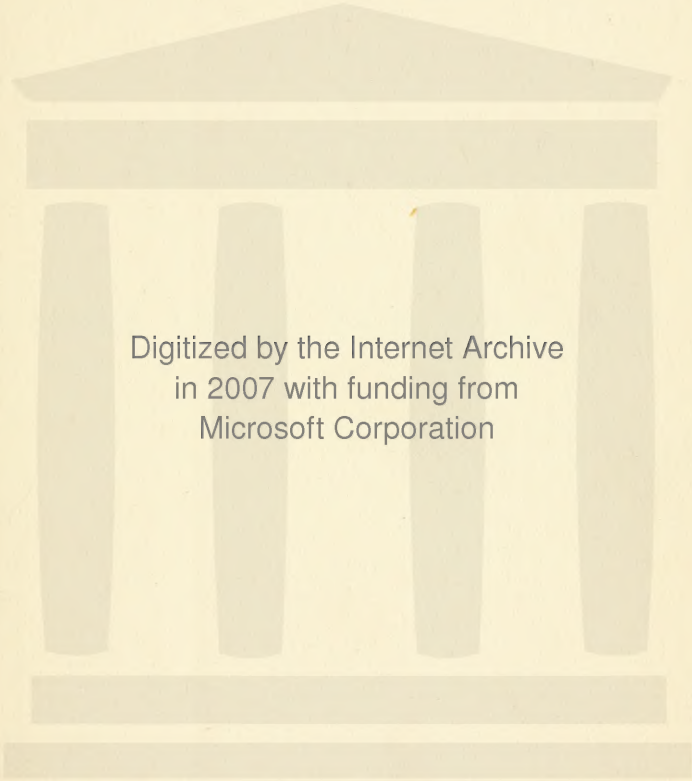
THE JOTTINGS OF AN OLD SOLICITOR

SIR J. HOLLAMS



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BY SIR JOHN HOLLAMS

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CONTENTS

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CHAPTER I

EARLY RECOLLECTIONS

I HAVE often been asked to commit to paper some of my professional and other experiences and recollections; but I have hitherto hesitated to do so, for I have no inclination to write a book, nor am I in any respect qualified to do so, and so far as I am personally concerned, I have nothing of the slightest interest to record. Possibly, however, some few reminiscences extending back to an unusually long period of persons and events, chiefly professional, may serve to call attention to interesting changes which have taken place during the period I can recall, and which, perhaps, few will deny, are in the main changes for the better; and the consideration of what has been done may

possibly call attention to improvements yet needed. Possibly, too, my own professional career may serve as an encouragement to some young men entering the profession, as I did, without any of the advantages which generally conduce to success.

My earliest recollection as a child is of the Vicarage at Loose in Kent. My father held the position of resident curate there for about ten years, and during that period the vicar of the parish (who, of course, received the tithes) never once visited the parish, or in any way interfered. It is true he suffered from bodily infirmity, and he was, I believe, an estimable man; but I suppose such a state of things would not now be tolerated. At that time no one seemed to consider that there was anything wrong in it, and beyond doubt, my father, who for all practical purposes was the vicar, was popular, and the parishioners were content. Thus, as is often the case, an unjustifiable state of things worked well.

At the period to which I refer there was great excitement with respect to Catholic emancipation,

and my father, with most of the clergy of that day, looked upon the proposed change as a great calamity. I was not of an age to understand what was the matter, but I well remember the general expression of grief as if some personal affliction had happened. I can recall a small dinner party to which I was admitted at dessert. My mother was eating a piece of orange peel, and a neighbouring clergyman asked her if she liked Peel, on which she indignantly threw the piece of orange peel down. The incident, of course, referred to Sir Robert Peel, and his advocacy of Catholic emancipation. It is difficult to realise how high feeling ran on the subject. I recollect my father, when about to go on horseback to a Protestant meeting on Penenden Heath, purchasing for the occasion a life preserver, and I was impressed by the anxiety with which his safe return was looked for. There was an old woman resident in the village who was a Roman Catholic, and very violent; she publicly said she would like to wash her hands every morning in Protestants' blood. It now seems incredible that

within living memory such a state of things could have existed, and that educated men should have taken the change to heart in the way they did. Now the surprise seems rather that it had not been made long previously.

The Vicarage of Loose reminds me of an occurrence which shows how greatly the present means of communication differ from what they then were. I well recollect a great commotion on the lawn of the Vicarage one Sunday morning. News had reached my father of the death of George the Fourth. There were no telegraphs, no railways, no available newspapers, and there was no Sunday delivery of letters. The question was whether in the prayers that morning my father was, without confirmation of the news, to substitute "William" for the "George" which had stood in the prayer-books for upwards of a century.

As an instance of one great change which has taken place I may refer to smoking. I well remember a conversation in a low tone between my mother and the wife of a neighbouring clergy-

man, who was asked in a kind of whisper about a young man of promise in the neighbourhood. The reply was that he was a nice young fellow, but with this addition in a very confidential tone, "But I hear he smokes." It is evident that smoking was then considered much in the same light as drinking or gambling in a young man would now be regarded. My father used once a year to go to a Tithe dinner, at which the farmers smoked. I recollect that on the following day his clothes were hung out on the lawn of the Vicarage to be purified, and were viewed by me and the other children with a kind of awe, as if he had been in some most dangerous and objectionable place.

About the time to which I refer, there was great excitement in Kent. Nearly every night corn- and hay-stacks were burnt, and men went from one farm to another breaking threshing machines, which had, I believe, then been recently introduced, and were considered prejudicial to the labouring man.

Politics ran very high, and an opponent in

politics was often treated as a personal enemy. It was, I believe, very seldom that those on different sides in politics were on visiting terms socially, and no language was too strong in disparagement of a clergyman who did not adhere to the old political clerical faith. But the views of the electors were sometimes peculiar. I remember a farmer, on being spoken to by my father about the then pending election, saying, "I always votes one and one. I gives both a chance—that's fair—and so you see no one can find fault." The meaning, of course, was that, there being four candidates—two on each side—he voted for one on each side, and thus practically neutralised his vote.

One of the sights at Election time was to go to Maidstone to see the coaches come in from London with out-voters, or supposed out-voters, for the Borough. There were two long processions of coaches-and-four, draped with the colours of the respective candidates, and their arrival was the scene of great excitement and tumult.

In the year 1837 Lord Beaconsfield (then, of course, Mr Benjamin Disraeli) was a candidate for Maidstone, jointly with Mr Wyndham Lewis. I well recollect Disraeli addressing the mob from the window of his committee-room, at the Bell Hotel. I was standing close to him. He said: "This is the (I think) fourth contested election I have had. On each previous occasion I have been successful at the nomination, but have been defeated at the poll. To-day I have been beaten at the nomination, but I am sure I shall be successful at the poll to-morrow." And so he was. He was not popular with the mob. They offered him bacon, ham, etc., and repeatedly suggested that he was a Jew; but he was very ready in replying to them. His appearance was very remarkable—long black hair in curls—and he was dressed in what appeared to be an extraordinary way, the extreme, it may be supposed, of fashion. Nothing like it had been seen in Maidstone before. Mrs Wyndham Lewis (afterwards Lady Beaconsfield) was with him, canvassing. She was very much younger than her husband,

and appeared to be a very attractive woman. Mr Disraeli stayed in the house of one of his leading supporters, and my wife (long before I thought of marrying any one) was on a visit at the same house. She used to give very amusing accounts of the chaff which went on. He was then chiefly known as the author of "Vivian Grey," and no one for a moment thought he was likely to be one of the leading statesmen of the century, or Prime Minister. It was generally supposed that his success at Maidstone, where he was second on the poll, was to be attributed to lavish expenditure by his colleague and others, rather than to any impression his eloquence had on the electors.

In January 1838 a state of things existed in the neighbourhood of Maidstone for several days which can now be hardly credited. There was an exceptionally heavy snow-storm, so heavy that the roads were completely blocked; there were no letters, and in the neighbouring villages it was not easy to obtain provisions — the tradesman's carts could not come. It was a

holiday time for boys — no school — no work. The country was like a great plain. You could walk across the fields and over the tops of the hedges. The coaches to and from London could not run. All working men were employed in digging out the roads, and when they were opened you passed through a high wall of snow on either side, exactly in the same way as you now do through a deep railway cutting. It was many weeks before the snow finally disappeared, but I think the mails were only suspended for about a week.

In the year 1839 my grandfather, Sir John Hollams, who resided near Deal, took me to a most remarkable dinner at Dover, which excited a great deal of public interest at the time. It was given to the great Duke of Wellington as Lord Warden of the Cinque Ports. Lord Brougham, who had been his great political opponent, was in the Chair, and there were, I believe, seventy peers present. Sir Francis Burdett, a prominent Liberal Member of Parliament, was also there, and made a speech. It certainly was a most remarkable

occasion. A special building was erected for the purpose, and armour from the Tower was brought down to give brilliancy to the scene. Lord Brougham's speech was one of most extraordinary eloquence, but it was criticised as having been somewhat fulsome.

In the year 1840 I came to London. The difference between the state of things which then existed and the present time is astounding, and it may be difficult to believe that any living man has witnessed such changes. The only railway then open out of London was the one to Greenwich. One of the sights of London was to see the mail coaches leave St Martins le Grand in the evening. Letters from Kent cost sevenpence each, and if there was any enclosure, however small, the postage was double. If one went into the country, all neighbours begged you to take back letters, and put them into what was called the Two-penny Post Office in London. Every Member of Parliament was besieged for franks. The performance at the theatres commenced at seven, and was not over until near twelve, but at nine there

was admittance at half price; very few young men went earlier. The invariable price of the best oysters was sixpence per dozen, and for a long time the maximum price asked for a cigar was threepence.

CHAPTER II

OBSOLETE PROCEDURE IN THE COURTS OF LAW IN 1840

ALMOST everything connected with the Law Courts and the administration of the law has completely changed.

The sittings for the trial of jury cases after term were limited to twenty-four days after Hilary, Trinity, and Michaelmas Terms, and six days after Easter Term. No London or Middlesex Special Jury Causes could be tried except in the limited time allowed after Hilary, Trinity, and Michaelmas Terms, but common jury cases were taken in term time.

When I came to town the Courts sat after term for the trial of jury causes at half past nine, and, as if for the mere purpose of wasting time, a judge, on the first day after term (except Easter)

came into the city to fix what was called the "Adjournment Day," being the day to which the Court would adjourn for the purpose of commencing the trial of causes in the city of London.

In those days there were no long cases, or comparatively few; owing to the strict rules of evidence which prevailed, the plaintiff was in very many instances unable to prove a *primâ facie* case, and consequently was non-suited. If the plaintiff escaped that fate, the defendant was in the like difficulty; he could not give the evidence on which he relied, and consequently his defence failed. I attended a consultation with Sir William Follett very shortly before his death, at which he said that none of the witnesses we proposed to call were competent witnesses, inasmuch as the case involved a right to recover dues under a custom in the Port of London, and each witness had consequently a scintilla of interest; but Sir William Follett added: "You can easily get over the difficulty. Have a number of releases printed and stamped, and let each witness as he goes into the witness-box sign a release of his interest—he

will then be competent!" The case in question discloses another illustration of the system which then prevailed. It was an issue from the Court of Chancery directed to be tried by a jury in a Common Law Court. Briefs were delivered to counsel; witnesses were subpœnaed, and all preparations made at exceptionally heavy cost; but a day or two before the day appointed for the trial, one of the partners in the defendant firm died. The firm consisted of several partners, and was a mercantile firm of high repute. Both parties desired the trial to proceed notwithstanding the death which had occurred. But counsel held that the Chancery suit had become "abated," and that consequently there was no jurisdiction to try the issue which had been directed, and that a Bill of Revivor must be filed. Thus enormous expense and inconvenience ensued, although, viewed as a matter of business, the death of the partner had no effect whatever on the litigation, and was wholly immaterial.

When I first knew the Law Courts, Lord Denman was Chief Justice of the Queen's Bench,

Sir Nicholas C. Tindal of the Common Pleas, and Lord Abinger Chief Baron of the Exchequer. In those days the judges were much more reticent than in more modern times. In fact, in trials by jury (and no causes were or could be tried without a jury) the presiding judge was supposed to be impartial—or rather to express no opinion, but in summing up merely to explain the law and read or refer to the evidence given on the one side and the other, without intimating his own view, or openly endeavouring to influence the jury as to the verdict they should give. But this kind of impartiality was dying out, and it became common for counsel to impress on jurors that it was for them to decide, and that they ought not to be influenced by the judge. I well remember a trial at Guildhall before Chief Justice Jervis, (I was not concerned in it, but was waiting for the next case), in which Serjeant Wilkins made, as was his wont, a very excited speech to the jury in replying for the plaintiff, and concluded by saying: "I tremble for liberty, I tremble for justice, I tremble for my country, when I find a

judge ignoring his position of impartiality, usurping the functions of a jury, the safeguards of the liberties of Englishmen, and endeavouring to deprive my client of that unbiassed verdict of a jury of his country to which he is entitled." At the conclusion of the speech it was announced that no other cases would be taken that day, and I did not hear the summing-up.

The first case the next morning was one in which I happened to be engaged for the defendant, and Mr Serjeant Wilkins was counsel for the plaintiff. It was an ordinary commercial action, free from any sensational elements, and involved mercantile questions of a kind with which that learned counsel was by no means familiar. In opening the case for the plaintiff he began by saying that the jury would have to deal with very complicated and difficult questions, and that it was a great satisfaction to him that they would have the aid and the guidance of one of the greatest judges who had ever adorned the Bench. When the Chief Justice came to sum up, he commenced by saying he did not know whether any

of the jury were in Court on the previous evening, when his brother Wilkins had thought fit to abuse him in unmeasured terms. At all events, the Chief Justice said, the jury had heard the fulsome and uncalled-for remarks which the learned counsel had made that morning, and added that he, the Chief Justice, hardly knew which he disliked the most, but thought on the whole he preferred the abuse.

Serjeant Wilkins was somewhat out of his element in mercantile law. I was once concerned for the plaintiff in an action on a contract made through a broker in the ordinary way by bought and sold notes. I could not prove my case without the evidence of the broker, who was by no means anxious to assist. When the case came on the broker had not arrived, but he was expected every minute. I explained the position to Mr Serjeant Byles, who was counsel for the plaintiff, and asked him to prolong his opening speech. He accordingly dwelt somewhat at length upon the legal points involved, and the decisions bearing on them. At last he paused and asked me if the

broker had arrived, and said he really could not keep up the opening any longer, and that we would have to be non-suited. Mr Serjeant Wilkins, who was counsel for the defendant, taking advantage of the pause when Serjeant Byles was speaking to me, got up in his usual ponderous style and said he had listened very attentively to the learned argument of his brother Byles, and as he felt he could not answer it, he did not think he should be justified in occupying the time of the Court, and consequently consented to a verdict for the plaintiff. Thus my client escaped the defeat which was imminent, and the absence of the essential witness was not divulged.

It may possibly be of interest to some to call attention to the change in the ordinary routine practice in the Courts, especially in undisputed cases, such as actions against the acceptor of a dishonoured Bill of Exchange, which, and other like actions, were then very often defended for the sole purpose of gaining time. The defendant would deliver a plea merely denying the acceptance of the Bill. Then under the usual notice to admit

he would admit that he did accept the Bill. Thus there was nothing whatever to try; but notwithstanding this, the action was entered for trial, and could not be tried until the next sittings or assizes (frequently some months afterwards) and was then by counsel briefed for the plaintiff brought before judge and jury as an undefended action, and the verdict of the jury taken. I remember a leading junior on the Home Circuit, afterwards a judge, saying he had received in fees forty guineas for briefs in undefended cases on the first day of Kingston Assizes. If the debtor did not attempt to delay the preceedings the process was equally absurd. The plaintiff issued his writ —say in the Court of Common Pleas—at an office in Chancery Lane. He had then to take it to be sealed to an office in Inner Temple Lane, where on payment of sevenpence it was stamped without any record being taken. A long string of clerks might be seen extending back into Fleet Street, each with his writs to be taken to the little office where they were sealed. The word "Devon" was impressed—this, I believe, was

in consequence of the fee going to Lord Devon, or to some one who had acquired it from him. When the writ had been served and no appearance entered, the plaintiff, at the expiration of eight days, was entitled to enter an appearance for the defendant. This was done by handing in a small square piece of parchment which all attorneys had printed, which ran—"A B, attorney for the plaintiff, appears for the defendant *sec. stat.*" You then filled a formal declaration by dropping it in a box, and proceeded to another office, at which you lodged a slip of paper called a "Rule to Plead." The defendant had no notice of the proceedings after service of the writ. If he did not within eight days deliver a plea, the plaintiff could sign judgment. The judgment was in actions on Bills of Exchange, and in most other actions merely an interlocutory judgment. The amount recoverable had to be assessed. In the case of a Bill of Exchange the only thing to be ascertained was the amount of interest payable from the maturity of the bill. The amount of that interest, although not in dispute, and

frequently not amounting to more than a few shillings, had to be formally assessed. For this purpose in term time a brief, with a fee of half a guinea, had to be delivered to counsel and handed in in Court applying for a rule *nisi* to compute the amount due. This rule had to be drawn up and served on the defendant, and when this had been done a brief, with a fee of one pound three shillings and sixpence, had to be delivered to counsel to apply in Court to make the rule *nisi* absolute. This rule again had to be drawn up and served on the defendant, with an appointment to attend the master to assess the amount of interest and tax the costs, and then at length final judgment was obtained. The process was equally dilatory, but somewhat different in vacation. All this involved a scandalous waste of money and delay.

It is to be borne in mind that there were no County Courts, and that this monstrous state of things applied to the most trivial cases—in fact to any case over forty shillings, except that when the claim did not exceed twenty pounds it was

possible to get it tried before the sheriff instead of in the Superior Court; but trial before the sheriff was not inexpensive or expeditious. A lower scale of costs prevailed when the claim was for less then twenty pounds.

Although the majority of the professional men now in practice do not remember the old system of pleading, all have heard of it, and few, if any, would desire its restoration. When a declaration was delivered in an important case it was always with fear and trembling that within four days a special demurrer might be delivered and the approaching sittings or assizes lost, with a delay of several months as a consequence. Any clerical error made by a clerk in copying was in such cases pretty sure to be followed by a special demurrer. As an instance of the feeling which prevailed, I was once advised to send papers to a particular junior counsel, because he wrote a clear hand and thus there was less danger of an error in copying. I could mention many instances of the extreme length and complications of pleadings, but I will only refer to one, in which my

opponent's office was in Verulam Buildings, Gray's Inn, and he said the record would, if unrolled, reach from his office to the Inner Temple. I remember asking a learned counsel if he had read a brief which had been delivered some days; he replied that he had only got through half the pleadings, which he found very complicated.

The machinery appeared to be devised with the view of creating useless expense, but both branches of the profession profited by it, and things were allowed to go on without protest. Any plea which concluded with a verification, including the ordinary pleas of payment and set-off, had to be signed by counsel; in the common pleas by a serjeant. This signature was affixed as of course by the clerk of the counsel or serjeant without reading the document, and for this trivial service a fee of half a guinea was paid. In many cases, for the purpose of obtaining the most common order, such as an order for a special jury, a brief had to be delivered to counsel, or rather to his clerk, the latter signed his principal's name and received half a guinea; the order was then

issued as of course without the slightest question as to its propriety. I recollect in some ejectment proceedings delivering on one day to a barrister, afterwards a very eminent judge, upwards of two hundred briefs, each with a fee of half a guinea, to move for judgment against the casual ejector, the whole being a fiction. An action of ejectment was nominally between John Doe, plaintiff, and Richard Roe, defendant. In the above two hundred cases counsel's clerk merely signed his master's name, and the briefs were handed in without any kind of investigation as to the propriety of the proceedings. These nominal fees of half a guinea must have constituted a substantial source of income to some of the serjeants, who were comparatively few in number and alone had right of audience in the Court of Common Pleas. In the other Courts the nominal fees were mostly given to young briefless barristers, and were very acceptable to some of them.

CHAPTER III

PROCEDURE IN THE COURT OF CHANCERY— ALTERATION IN RULES OF EVIDENCE

THE procedure in the Court of Chancery was, if possible, still worse than that in the Courts of Common Law, and caused frightful delay and expense. The suit was commenced by filing a bill, commonly of huge length, which concluded by repeating in the shape of interrogatories the various allegations in the bill. The defendant had then to file on oath an answer dealing in detail with the various allegations in the bill. The answer was frequently accompanied by a very elaborate and detailed schedule, setting out accounts or other general matter. Although each defendant had to swear to the truth of the answer, few understood the effect of the document, and the oath was often treated as a mere formality. Indeed I heard

Lord Lyndhurst, when sitting in Court as Lord Chancellor, say he had himself sworn to the truth of an answer without having read it. The evidence of witnesses was taken in a private room *ex parte* before an examiner. The judge did not see the witnesses. If there was a serious conflict as to the facts, the judge frequently directed an issue to be tried in a Common Law Court by a jury. This practically involved to a considerable extent the expense and delay of another action. If a question of law as distinct from equity arose, the Chancery judge directed a case to be stated for the opinion of a Common Law Court. This again involved to a great extent the evils of another action. But after an issue had been tried by a jury, or the special case decided by the Common Law Court, the whole matter came again before the Chancery judge for his decision, which decision was subject to appeal to the Lord Chancellor, and thence to the House of Lords. The judges of the Common Law Court merely answered the questions submitted to them without giving any reasons for their decision.

In 1840 there were two Chancery judges of

first instance, viz. the Master of the Rolls, and the Vice-Chancellor; but the Lord Chancellor also occasionally sat as a judge of first instance. The appeals from the Chancery judges were heard by him alone; and when there was an appeal from a decision of his to the House of Lords, it occasionally happened that he alone heard and decided it, the two requisite other peers present being laymen or bishops, who took no part, and were in fact mere dummies. The Court of Exchequer had also equity jurisdiction, and although in those days the distinction between law and equity was much more marked than it now is, one of the judges of the Exchequer (a Court disposed to be very technical and strict) sat as an equity judge in the little Court behind the old Court of Exchequer in Westminster Hall, to administer a branch of the law with which he was not very familiar.

Where the business was non-contentious, the system was indefensible. After the elaborate process of bill and answer had been gone through, the suit came before the judge for hearing, and

the whole matter was in a vast number of cases thereupon, as of course, referred to the master of the Court. The office of Master in Chancery differed very materially from that of the present masters. The Master in Chancery was a highly-paid official, with practically very little to do. He acted judicially, sat in private, and had a staff of clerks. His chief clerk and his staff attended to all details. In the first instance everything went before the chief clerk and was dealt with by him before it was submitted to the master. When it came before the latter it was often dealt with in a somewhat off-hand manner, for if it involved a question of any importance it was certain to be subsequently argued before the judge in Court. When I was very young I was sent to attend an appointment before Master Farrer, who was distinguished as a very courteous and able master. The question arose on the construction of a will, and a considerable sum of money depended upon it. I found in attendance as my opponent, Mr Rolt, then in extensive practice as a junior counsel, who was afterwards Attorney-General,

and ultimately Lord Justice. Master Farrer, recognising the absurdity of the position, at once suggested to Mr Rolt that it was not worth while for him to argue the case, as it would of course have to be decided by the judge in Court. Mr Rolt said he recognised that, but his client wished to go to the Court with the master's decision in his favour. Master Farrer said: "I am surprised, Mr Rolt, that with your experience you should favour such a view. I should have supposed you would have considered it more advantageous to have the master's decision against you."

The procedure in the master's chambers was wholly indefensible; the fault was chiefly in the system, not in the administration of it. For instance, if it was proposed that a lease should be granted of a farm or of a house, the first thing was for the solicitor for the plaintiff to prepare an elaborate state of facts, giving particulars in detail of the property and proposal—this statement of facts had to be supported by an elaborate affidavit. The matter then went before the chief clerk of the master. The chief clerk then drew up an elaborate

report, in which all the facts were again detailed. The solicitors having, often after considerable delay, obtained a copy of this report, an appointment was obtained before the chief clerk to settle the report. The chief clerk having, after discussion, settled the report, an appointment was obtained before the master to confirm it—this was usually done as a matter of course, but occasionally after somewhat prolonged discussion. Subsequently an appointment was obtained for the master to sign the report. It having been signed, it was taken to another office and filed. A petition was then prepared, in which the voluminous report was practically set out *verbatim.* This petition was presented, and in due time came before the judge in Court; whereupon on application by counsel, an order was at once made approving the proposal and referring it back to the master to settle and approve the form of the lease; then this simple matter again went back to the master's chambers with the same detailed elaboration.

Some idea of the enormous expense thus

involved may be formed when it is borne in mind that in those days every one who had a scintilla of interest in the estate was made a party, and was represented by separate counsel on every application to the Court. The several solicitors for each party attended all the proceedings; and if there was any charitable bequest, the Attorney-General was made a party, and was represented on all occasions. Thus, the cost of the most simple application was frequently very serious, and such applications were in many suits constantly recurring.

The solicitors had in Chancery proceedings to employ a nondescript kind of official who was called "A Clerk in Court." The Clerks in Court sat in small boxes in a large room in Chancery Lane, they were paid by the solicitor instructing them, and many of them made large incomes. When the office was abolished, they received very large annual sums as compensation, and their widows also had annuities. They were supposed to be experts as to practice, but were of no use to an experienced solicitor.

The present system of dividing the statements in affidavits into several paragraphs, each numbered, originated in a rather curious way. I had suddenly to prepare some affidavits in support of a motion to dissolve an injunction which had been granted to restrain the sailing of a ship, and with a view to conciseness, and for reference, prepared the affidavit in short paragraphs, each numbered. The case came before Sir George Turner when Vice-Chancellor, and he at once expressed strong approval of the way the affidavits were prepared, and soon afterwards it became the rule.

One instance will perhaps suffice to show how, in former times, the enforcement of claims which were not in fact disputed could be prolonged by the aid of the Court of Chancery.

I acted for a firm of merchants carrying on business in Russia, who had consigned cargoes to a well-known English firm for sale, and admittedly many thousand pounds were due by the English firm to the Russian firm. In fact, account sales had been rendered, and there was no kind of dispute as to the indebtedness, or as to the

amount of it. But there happened at the time to be a serious financial crisis, and consequently it was not possible, or at all events, not convenient, for the English firm promptly to pay the large sum due, although they were still carrying on a large business, and were in good repute. I commenced an action in a Court of Common Law for recovery of the money, to which action the defendants put in the usual dilatory pleas; but as the case would, if left to take its ordinary course, have come on for trial as an undefended action, or as an action in which no defence could practically be raised, before it was convenient for the defendants to pay, they filed a bill of great length in the Court of Chancery, asking to restrain the proceedings at law, and setting out wholly fictitious allegations, based on the imagination of the draftsman, and without the slightest semblance of foundation. To this an answer had to be put in by the Russian firm and deposed to by each partner on oath, and unless in such a case the sworn answer was filed within six days, the common injunction to stay the proceedings at

law until the answer was duly filed was issued as a matter of course. It may be readily understood that it was no easy matter to make the Russian merchants—imperfectly acquainted with the English language — understand what was required for the requisite detailed answer, and as they were not all resident in St Petersburg, the difficulty was increased. Ultimately, when the answer was filed, the plaintiffs in Chancery (*i.e.*, the original defendants) lodged exceptions to it for insufficiency, and those exceptions had to be set down for argument in Court. In the end, the panic having subsided, the defendants paid the claim and the taxed costs; their solicitor at the time told me the delay was well worth the expense the defendants had incurred. Thus in the particular case no harm ensued, except that the plaintiffs were most unreasonably kept out of their money. But such proceedings were not uncommon, and the filing of a Bill in Chancery to restrain a Common Law action was not confined to fictitious cases.

If the defendant in a Common Law action

desired to see books or documents in his opponent's possession, the only course was to file a Bill of Discovery, and the common injunction then issued, unless a full answer could be filed in six days which was very seldom the case. Thus, the Discovery, which can now be obtained in a few days, and at comparatively trifling expense, could only be had by instituting a distinct suit in the Court of Chancery, the cost of which always fell on the applicants, and consequently it was only resorted to when the stakes were large. I was engaged in a case in which the action at Common Law was stayed for years, first pending a hearing in Court before the Vice-Chancellor as to the sufficiency of the answer as to documents and objection to their production, and subsequently by successive appeals to the Lord Chancellor, and from him to the House of Lords on that point.

It is certainly remarkable that some old practitioners are still to be found who are disposed to sneer at the Judicature Acts and all modern changes, and to suggest that the old

system had its advantages; but I doubt if any one would seriously propose to revert to the former state of things. It may be, and probably is, true that the result of the change, as to the ability of the parties to give evidence on their own behalf, has been to increase perjury as well as to prolong trials, but beyond doubt it has in numberless cases enabled justice to be done.

I happened to be engaged in the first case tried at the Guildhall after the Act enabling the parties to give evidence came into force. The witnesses were ordered out of Court, and this was supposed to include the parties if they desired to give evidence. The dispute between the parties was as to the validity of the payment of the freight of a cargo. My clients, the consignees of the cargo, had, pursuant, as they contended, to custom, paid the freight to the brokers of the ship, who shortly afterwards became bankrupt. The shipowners denied the validity of the payment, and refused to deliver the cargo. I, accordingly, on behalf of the merchants, issued a writ in the Court of Common Pleas for non-delivery of

the cargo. The shipowners then commenced an action in the Court of Queen's Bench for the freight. Both actions were entered for trial at the ensuing Guildhall sittings, but the action in the Queen's Bench came on two or three days before the day on which the Common Pleas action was appointed for trial. The shipowner, instead of disputing the custom which it was supposed was the question to be tried, went into the witness-box, and said that he had, on the day after the then previous Christmas Day, seen one of the defendants in the London docks, and he had given him express notice not to pay the freight to the brokers. This was a suggestion for which we were not prepared, but inasmuch as the witnesses had been ordered out of Court, it was not deemed right to explain to the defendant, to whom the notice was said to have been given, what had passed. Consequently, when he was called as a witness, he could merely in general terms deny having received such a notice, but was not prepared to say that he might not have seen the plaintiff on the day named in the

London docks. Lord Campbell summed up the case strongly in favour of the plaintiff, pointing out the clearness of his statement and the comparatively vague denial of the defendant; and the learned judge, as was his wont, took the opportunity of enlarging on the ability and energy of British shipowners, and how much the prosperity of the country depended on them. The jury, of course, found a verdict for the plaintiff.

As soon as the defendant, to whom the notice was alleged to have been given, became acquainted with the details of the evidence of the plaintiff, and had time to reflect, he was clear that that evidence was false. It was consequently determined to try the cross action in the Common Pleas, notwithstanding the verdict upon the same question of fact in the Queen's Bench action. Accordingly the Common Pleas action was tried two or three days afterwards. The plaintiff, who was the defendant in the former action, and several other witnesses proved conclusively that on the day named, the defendant was hunting with the fox hounds in Hertfordshire. In fact,

Mr Serjeant Byles (counsel for the shipowner and the then defendant) said he admitted that it was so, and that further witnesses need not be called. During this evidence the defendant, the shipowner, was out of Court, and what had passed was not communicated to him. When he was called as a witness, Mr Serjeant Byles adroitly suggested that he should not tie himself to a particular day as to his suggested interview with the merchant; but the shipowner said he was quite positive as to day and time, and that he was only in London on that day. The merchants, of course, obtained the verdict, and the Court of Queen's Bench set aside the previous verdict. Lord Campbell was greatly disconcerted at the result, as he had gone out of his way to laud the plaintiff. Lord Bramwell, up to the time of his death, frequently referred to this case as a remarkable one. Consequent on what had thus happened, the judges announced that an order for witnesses to leave the Court was not to apply to the parties to the cause.

Although in this case attended with useful

results, there was an obvious absurdity in a system by which precisely the same question, and between the same parties, had to be determined in two different actions within a few days; I can, however, give another singular instance where it operated in the interests of justice. Clients of mine in London had large transactions with a mercantile firm in Holland. My clients had purchased a steamship, as they said, for the Dutch firm, but that firm maintained that the ship had been bought on the private account of one of the partners who had got into difficulties. Assuming the vessel to have been bought for the Dutch firm, that firm owed the London firm a large sum of money; but if the ship was to be treated as having been purchased for the individual partner, the London firm owed the Dutch firm a large sum. The Dutch firm commenced an action in the Common Pleas, and thereupon the London firm commenced a similar action in the same Court. The action brought by the Dutch firm stood somewhat higher in the list than the other action, and consequently came on first.

Chief Justice Jervis, who was a most remarkably astute judge, was struck by the plausible evidence of the principal member of the Dutch firm, who stated that he had written a letter to the London firm expressly stating that if his partner bought a ship it was to be treated as a private transaction, and not one on account of the firm. My client denied having received any such letter, but the Dutch merchant said he had posted it with his own hands, and he produced a letter book with a machine copy of the letter in the middle of the book, apparently in the ordinary course of business. The Dutch merchants obtained the verdict. The cross action was not to come on for three or four days. In the interval I found that the plaintiff's evidence was in several respects clearly false, and having obtained an order to examine the letter-book, I found, on close investigation, a slight difference in the print of the number of the page containing the copy of the disputed letter, and on enquiry as to this of the stationers in London who I found had supplied the book, I discovered that the Dutch-

man had taken the book to the stationers to be rebound by them, having—but not to their knowledge—substituted the fictitious copy of the alleged letter for another letter. In the end the Dutchman was tried at the Central Criminal Court for perjury, and although he was strenuously defended by Mr Edwin James, then in the height of his professional career, was convicted, and severely punished.

Although the instances of precisely the same question having, as in the two cases to which I have referred, been tried in cross actions with different results within a few days of each other, were probably exceptional, cross actions between the same parties raising the same question were very common. There was no system of counter-claim, and it only occasionally happened that the cross demand could be raised by way of set-off. Thus much useless expense was incurred with no conceivable advantage to either party. It was frequently arranged that the two actions should be tried together, which course somewhat lessened the cost, but was in many respects inconvenient.

CHAPTER IV

FRAUD—TRIAL BY JURY

Reference to bygone cases of fraud is seldom of present interest. I could refer to many instances of extraordinary effrontery, especially in claims on underwriters. For instance, one captain of a ship accounted for the non-production of his log book by saying a little dog on board the vessel had eaten it. Another captain said that after it had been determined to abandon the vessel as she was sinking, and after the crew had got into the boats, he sat on the deck and wrote in his log book an account of the weather and the cause of abandonment. I may, however, refer to an action brought against underwriters to recover a large sum for the loss of a cargo, alleged to have been of great value, and shipped at Mogador for this country. The defence which was estab-

lished was that the cargo was a bogus cargo, and the loss of the vessel intentional; but the remarkable incident connected with the case was that I obtained possession of some letters written in Arabic by the shipper in Mogador to a confederate in England. These letters were worded in the most fervid religious language, such as "The Great God has heard our prayers. He is favouring our enterprise. We will continue to pray and may be assured that we shall succeed, etc." There was no suggestion of any impropriety in the transaction.

I was engaged in a somewhat remarkable action as to a cargo of wheat, of the value of about nine thousand pounds. The Bill of Lading of the cargo had in the ordinary course been sent to a Greek merchant in London, but before the arrival of the vessel he had absconded and become bankrupt. When the cargo arrived it was claimed on behalf of two women, posing as ladies, who said that they had purchased the Bill of Lading. Their story was, that on a Sunday afternoon they were walking in

Kensington Gardens, and there met by chance the Greek merchant with whom they were slightly acquainted, consequent on their having for a short time, several months previously, stayed at a boarding-house where he was a boarder. On the afternoon in question they asked him if he knew of a good investment for money, and in reply he recommended the purchase of a cargo of wheat. Accordingly it was arranged that he should call on them the next morning at their lodgings, and bring the Bill of Lading. This he did, and they thereupon handed him in gold nine thousand pounds. He decamped the same day and had not since been heard of. Enquiries were made, and it was found that there was no evidence of the claimants being possessed of money. On the contrary, it appeared that they were living in inexpensive lodgings, and that they could not, or did not, pay small debts due by them. On cross-examination in Court they stated that on the day before they met the bankrupt merchant, a distant relative of theirs had arrived in London from Canada; that this relative had many years

previously defrauded their family, and that he had called on them, conscience-stricken, to make restitution, and had left them the money in gold and immediately sailed for Australia; and that they had placed the gold in a drawer in their bedroom until they handed it to the Greek merchant in exchange for the Bill of Lading. The women were fashionably dressed and were very intelligent. Chief Justice Bovill, then at the Bar, was leading counsel for the assignees in bankruptcy, the plaintiffs in the action, and he (Mr Bovill) cross-examined the elder of the claimants at very great length; but she parried every question, and always had a more or less plausible answer. Mr Bovill, although he had a very large practice in jury and other cases, had not the reputation of being a severe cross-examiner. Mr Serjeant Ballantine was second counsel for the plaintiffs, and he proceeded to cross-examine the other claimant in a very different manner, and with great severity — transfixing with an almost fierce gaze the witness, who was good-looking and had a pleasing manner. The effect

of the cross-examination was marvellous, for in less than a quarter of an hour she fell down flat in the witness-box, and could not be further questioned. The result was greatly to prejudice Chief Justice Erle, who in summing up said they had witnessed an exhibition of brute force which he had never before seen in a Court of Justice, and hoped never again to witness. In the result the plaintiffs, the assignees in bankruptcy, had the verdict, but it was without doubt jeopardised, notwithstanding the extraordinary story relied on, by the extreme severity of the cross-examination.

The mode in which trials by jury were formerly conducted was in many respects different to that which now prevails. Not only, as I have said, was the judge supposed to be impartial in the sense that he did not openly endeavour to influence the jury, but in the early days to which I can refer, the judge made very few remarks until he summed up. Notably Lord Campbell repeatedly ejaculated, "Go on," and when any point which he deemed immaterial was raised, he complained of the waste of public time. If a question of law arose as

to the construction of a document or other like matter, he would defer it until the proverbial lunch-time. He would then tell the jury they might retire for ten minutes, and then he would say to counsel he would, in the absence of the jury, hear the point of law. He thus occupied the interval of ten minutes, and having declined to stop the case and told counsel to address the jury, the learned judge retired to his own room for luncheon, without regard to the speech of counsel—thus the business of the Court was not for a minute suspended, and the professional men had no interval at all. Moreover, as I have before said, the Courts at Guildhall sat, when I first recollect, at half past nine in the morning, and frequently until late in the evening. I have several times been in Court at Guildhall until ten or eleven o'clock at night. I well recollect a special jury action being called on before Lord Campbell at twenty minutes to six on a very severe night just before Christmas. Lord Bramwell, counsel on the one side, and Mr Justice Shee on the other, joined in protesting against

commencing the case that night. Lord Campbell merely said, "Swear the Jury," and he tried the case out that night, although it took several hours —witnesses being examined on both sides.

There is strong reason to believe that this excessive zeal to save time and get through the business did not always conduce to the satisfactory administration of justice. I happened to be in the Court of Common Pleas at Westminster, when Mr Keating (afterwards Mr Justice Keating) moved for a new trial in an important will case tried before Lord Campbell and a special jury at Stafford. The case was one which was of great local interest. Sir Alexander Cockburn had gone down specially as counsel for the plaintiff. Mr Justice Keating, in moving for a new trial, said that the trial commenced at nine o'clock on a Monday morning, and that the Court sat until eight o'clock that night, and then adjourned until eight o'clock the next morning—that at eight o'clock on the Tuesday evening the plaintiff's case was closed—that the Court had sat continuously that day for twelve hours—that the Court was

very crowded and heated—the jury were country gentlemen, accustomed to be in the open air—and that in fact when the plaintiff's case closed there was only one man in Court who was not physically and mentally exhausted. Under these circumstances the learned counsel said he appealed, but appealed in vain, to be allowed to open the defendant's case the next morning. The judges of the Common Pleas saw the disadvantage at which the defendant had been placed, and granted a new trial. Thus the heavy cost of the previous trial was thrown away, and the decision of the question in dispute was greatly delayed, consequent on the desire for undue expedition.

Lord Campbell certainly did not spare himself. I was engaged in a case tried before him at Norwich assizes. The trial was not a very long one, nor did it involve any question of general interest—it was, in fact, in relation to a cargo of linseed cakes. The trial lasted longer than had been anticipated, and at seven o'clock the learned judge was reminded that he had invited

the Bar to dine with him that evening. He merely, as usual, said "Go on," and it was not until about ten o'clock that the trial ended. The next morning I went to the railway station at seven o'clock, on my return to London, and found Lord Campbell walking up and down the platform, in a snow-storm, on his way back to London. But late sittings were not confined to cases tried before Lord Campbell. I was, many years ago, in Court at Bristol until one o'clock on a Sunday morning in an action tried before Lord Truro, when chief justice of the Common Pleas. Indeed, very late sittings were common enough, not only at assizes, but in London.

Another great change is the discontinuance of the system of locking up juries for the night if they have not agreed on their verdict, and not discharging them until the following morning. The appearance of the jury when they came into Court after having been locked up for the night, and, of course, without having had refreshment of any description beyond that which the cautious among them carried in their pockets, was, as may

be readily imagined, most deplorable. No doubt the dread of being locked up tended to prevent trials becoming abortive, as they now more frequently do, by reason of the jury not having agreed, and it often happened that one or more members of the jury having strong views coerced the others. A somewhat remarkable instance of this occurred in a case tried at Guildhall, in which I was not concerned, but I happened to be watching for the next case. The action to which I refer was for libel—the plaintiff being a Roman Catholic, and the defendant a prominent Evangelical. The foreman of the jury was a client of mine, a man of great intelligence, but of very strong religious views, and especially hostile to Roman Catholics. I casually remarked to the plaintiff's counsel that I did not think they would get a verdict, but was told in reply they were certain of a verdict, and that it was practically a question of damages, as there could be no defence to the action. However, the jury found a verdict for the defendant. A few days afterwards my client, the foreman of the jury, called on me on private

business, and said he had seen me in Court when he was on the jury—that he had never had a harder task than to get the verdict for the defendant. He said that when the jury retired they all sat down at a table, he as foreman taking the Chair. He addressed his fellow-jurymen, saying he was in favour of a verdict for the defendant, and asked those who agreed with him to hold up their hands; but no one did so. He then asked those in favour of a verdict for the plaintiff to hold up their hands—six did so. My client said he saw that mode of proceeding would not do, and he suggested they should leave the table and talk the matter over. He then took the five jurymen who had not held up their hands singly, and had not, he said, much difficulty in getting them to agree with him rather than being locked up all night. He then took the other six, one by one, pointing out that he would certainly submit to be locked up for the night rather than agree to any verdict other than for the defendant, and ultimately, after a good deal of remonstrance and angry discussion, as well as

of entreaty—one of the jury pleading that his wife was seriously ill, and would be alarmed if he did not return—he at length induced all the jury to agree. Beyond doubt, my client, who was a man of strong prejudices, did not intend to do wrong; but the case affords an instance of the way in which the threat of being locked up affected the due administration of justice. Lord Campbell was very irate when juries did not agree, and said that on circuit the judge ought to take the jury in a cart to the border of the county, and then, if they had not agreed on their verdict, leave them in a ditch.

An action of considerable importance brought against a railway company for personal injuries was tried before Lord Campbell at the Guildhall. Admittedly the plaintiff had sustained very serious injuries, but there was a great conflict of evidence given by eminent scientific witnesses as to whether the accident had resulted from negligence on the part of the company. The jury were locked up all night, and the next morning they came into Court in the most miserable and worn-out

condition, and gave a verdict for the plaintiff, damages one shilling. Lord Campbell was very angry, and said it was no verdict, and he would not receive it, and that the jury must further consider the case; they claimed their right to be discharged as they had given a verdict, and there was some talk of an action for false imprisonment, as although the verdict was obviously the result of a compromise, and was absurd, yet it was in fact a verdict which the jury had power to find. It was clear, however, that if the plaintiff was entitled to the verdict, the damages should have been considerable.

Lord Campbell was fond of dwelling on the privileges of a jury—indeed, he never lost an opportunity of saying something which he thought would be popular. On one occasion he made a statement which was fully reported in the newspapers, that special jurymen who were summoned for a case which was withdrawn before being called on, were entitled to be paid their fees in like manner as if they had been sworn. At that time a separate jury was summoned for each case,

and there was not, as now, a general panel. Consequently, it seemed hard that the jury, who might have been in attendance for several days, should be wholly unremunerated, and Lord Campbell enlarged strongly on this, and ordered payment of the jury. The following day I happened to be engaged in a case in the adjoining Court of Common Pleas, when my clerk came to me, saying that a case in the Court of Queen's Bench, in which I was acting for the defendant, had been withdrawn—that the jury had asked for their fees, which Lord Campbell said should be paid, and directed me to be sent for. I went into Court, and said that if his Lordship considered he had power to make such an order, and did make one, I would, of course, obey it, but inasmuch as his power to certify for a special jury could only be exercised after verdict, it seemed clear that if the money was paid it could not be recovered from the delinquent plaintiff, and consequently must either fall on the defendant, who had had an unfounded action brought against him, or must fall on me personally. I further

pointed out that twenty-four special jurymen were summoned, and that it was impossible to ascertain which of them would have been sworn, and, consequently, who would be entitled to a share of the twelve guineas. Lord Campbell merely said to the waiting jurymen, "Gentlemen, I cannot help you," and nothing further was heard of the right of unsworn jurymen to be paid. I do not think Lord Campbell ever forgave me. His annoyance was increased by Chief Justice Jervis, who had no love for him, taking the opportunity of ridiculing the suggested power to order payment of fees to jurymen summoned but not sworn, and asked how Lord Campbell proposed to enforce his order. The suggested grievance of the special jurymen was in fact imaginary rather than real. There seems no valid reason why special jurymen should be remunerated when the members of the common jury, whose time is often of more importance to them, are practically unremunerated. Indeed, the practice of remunerating special jurymen appears to be based on an erroneous principle. I believe the remuneration

was conceded on the ground that the special jury had to perform extra duty, viz. that of serving on special juries as well as on common juries, but although this has been repeatedly pointed out, the system still prevails of practically excluding those qualified for service on special juries from the duty of serving on common juries. The result is to deteriorate the common jury. Not only so, but the change as to qualification, which has been made, has greatly deteriorated the special juries, at all events in London. The special juries are no longer composed of merchants properly so called, or of prominent persons, but shopkeepers and publicans who are large rate-payers are competent to serve. The remuneration is far too trifling to attract the more desirable persons who are qualified, but, coupled with the importance of the position, is not distasteful to those who are perhaps less qualified, and especially to those who keep public-houses, who can well spare the time in the day, and like to recount what has passed in the evening.

Formerly, when a special jury was desired, it

was necessary to give a brief to counsel to move for one. The application was granted as of course, without any discussion—in fact it was *ex parte*. Then the names of forty-eight qualified jurymen were selected by ballot, and each party was entitled to strike out twelve of those names. This was a matter of great importance, in order to secure the omission of any one likely, from the nature of his business or otherwise, to take an adverse view, and if possible to retain any one thought likely to be favourable. The revision of the Special Jury List had often great influence on the result of the action.

CHAPTER V

EXPENSE OF JURIES — COST OF LITIGATION AND APPEALS

A PRACTICE formerly unknown has grown up which frequently adds substantially to the far too heavy cost of litigation, viz. that of yielding to an application by the jury for payment day by day, instead of the recognised fee of one guinea for each case. Trials have been prolonged to an extent formerly unheard of, and the extra remuneration becomes substantial. It is practically levied as a kind of blackmail. It can only be done by consent of the parties, but I have never known an instance in which a litigant or his advisors have ventured to refuse to consent. I remember a discussion on the subject at a meeting of the Judicature Commission, when several members of that Commission expressed their astonishment

that any judge should allow such an application to be entertained, and general condemnation of the practice was expressed, but, nevertheless, it has continued, and, indeed, appears to be treated quite as a natural and reasonable request. Mr Justice Wills, however, some time since, publicly expressed his disapproval of it, and it is to be hoped that it will be discontinued.

Although the increased payment to the jury is one of the incidents of the prolonged length of trials, it is by no means the most important one. From one cause or another trials occupy much more time than they formerly did. It used to be the exception for a jury case to occupy more than one day. Now a seriously contested case is seldom concluded in a day. Doubtless one cause of this is the comparatively short hours during which the Courts ordinarily sit. Practically the actual time occupied with the case is less rather than over five hours, for, assuming the hearing to begin precisely at half past ten, and assuming the adjournment for luncheon to be strictly limited to half an hour, and the Court to

rise at four, only five hours are available. The excessively long hours during which the Courts formerly sat were, no doubt, very objectionable, and as the Courts now sit day by day for the trial of cases, instead of at intervals, it would be manifestly impossible to sit for the unreasonable time they formerly did. An extra hour, or even an extra half hour would, however, be a great advantage to the suitors in witness actions, and if, as would undoubtedly be desirable, those actions were not taken on the half day of Saturday (which ranks as a whole day as regards expense) no great additional burthen would be thrown on the judges. Another cause of the great length of trials, doubtless, arises from the parties in every action being almost as of course examined, and from correspondence and documents being produced and referred to, to an extent formerly unknown. Probably few judges realise the cost of jury trials. I have on several occasions estimated that the cost amounted to one pound per minute. This, no doubt, is exceptional, but I don't think ten shillings a minute is so, and yet time is not

unfrequently taken up by discussion of some other case or other arrangements. The great change in the duration of trials by jury will perhaps be more apparent when it is borne in mind that until a comparatively recent period—at all events, until long after I began to practise—the special jury cases in London and Middlesex were appointed for specified days, and usually four or five for each day, and a separate jury was summoned for each case. This was done on the supposition—generally mistaken—that the cases thus appointed would be disposed of on the days named. The cases not reached on that day were put into the list for the following day, to the disarrangement of the cases appointed for that day, and so on. The arrangement was most inconvenient and objectionable, but in practice it was not nearly so unworkable and absurd as it would be now, bearing in mind the length of time now necessarily occupied in trying a single case. In fact there were only twenty-four days available after term for trial of special jury cases in London and Middlesex, and those twenty-four days had to be

divided between them—leaving twelve days only for London and twelve for Middlesex.

The enormous cost of trials, frequently very disproportionate to the pecuniary importance of the case, has naturally tended to drive business away from the Courts and to induce disputants to resort to unsatisfactory arbitration or compromise of just claims. But serious as is the cost of trials, it is by no means the only, nor do I believe it is the chief cause of the reluctance of mercantile men to embark in litigation. Formerly the verdict of the jury was in the great majority of cases practically conclusive, and ended the litigation. It is true that a new trial might be applied for. If granted on the ground that the verdict was not in accordance with the weight of evidence, it was conditional on the applicant paying the cost of the former trial, which many litigants were unwilling or unable to do. If the application was refused, the verdict stood, and there was no appeal unless some point of law arose. Thus ordinarily the suitors could see the end of the litigation, and, so to speak, knew the

worst of it, both as respects cost and time. Prolonged time is, in my experience, even more objectionable to mercantile men than expense.

In the present day it is impossible to give any reasonable estimate as to the time within which the litigation must end, or as to the expense which it may involve. Almost every decision is subject to the risk of appeal to the Court of Appeal, and from that Court to the House of Lords, and those successive appeals may conceivably happen more than once in the same case. The practical mischief from this unrestricted right of appeal arises from the modern system introduced by the Courts, without express legislative authority, of allowing the successful appellant the cost of the Appeal and of the decision appealed from. Formerly this was unheard of, and consequently even when there was power to appeal it was not exercised, for the unsuccessful litigant knew that even if the Appeal should be successful he would have to pay his own costs, and if it was unsuccessful, the costs of his opponent also. Now, what the *Times*, some time back, aptly described as the "gambling

element," has been introduced into litigation, the stake constantly increases with successive appeals, and encouragement is given by one final effort to throw the whole costs on the hitherto successful party. In many cases this has been the result, and many suitors in actions involving questions open to different views, have had reason greatly to regret that in the first, and it may be also in the second, Court they were successful. It is said that logically it is right that the party decided to be in the wrong should bear the cost, but even those who defend the present system do not fully carry out this view, for admittedly the taxed costs which the unsuccessful party has to pay are often much less than the costs incurred, and no one suggests that the successful litigant shall bear the costs of issues on which he has failed, although reasonably raised — or indeed that he shall be indemnified with respect to possible mistakes made by his counsel or his solicitor. Such mistakes are a misfortune which admittedly he has to bear, and it does not seem unreasonable that a mistake made by the judge, or by the jury,

should be treated as a common calamity. Certain it is that the present system operates very prejudicially to the profession, for unless there is a very large sum at stake, no one can, in a case open to reasonable doubt, advise a prudent man to incur the risks of litigation with a powerful opponent.

But the right of appeal is sometimes defended on the ground that it is desirable that principles of law should be accurately decided for the benefit of the public. It seems, however, somewhat hard that the suitor of the day should be fettered by the interests of posterity which has done nothing for him. Again it is said that obviously the right view should prevail, but this assumes that the ultimate decision adopts the right view. The decision of the House of Lords is undoubtedly the final view of the question, but it by no means follows that it is admittedly the right one. It is not uncommon for the noble Lords to differ, and for the decision to be that of a bare majority, and to be contrary to the views of very eminent judges in the Courts below. Moreover, the decision may be on a question of fact and be wholly unimportant,

except to the suitors in the particular case. At all events, it cannot be doubted that if an appeal from a decision of the House of Lords were possible, it would, under the present system as to costs, be resorted to. It is also to be borne in mind that in most, if not all, honest litigation on questions of law, the matter is capable of two views—the probabilities are that each party has acted under competent advice, and especially when eminent judges have differed it is impossible for any one to say that the decision is unquestionably right or wrong, although it prevails when it is that of the ultimate tribunal; but, after all, it ends as it began, on the opinion of those who have considered the question. A will or other document may be so ambiguously worded that the construction of it cannot by any one be considered clear.

It is difficult, in my experience, to get suitors to realise any great distinction between one judge and another. The general public certainly have great confidence in the judges, and, speaking generally, they consider a judge a judge, and they

are at a loss to understand how it can be, as has not unfrequently happened, that the majority of the judges who have considered the particular question, have been in favour of a litigant who has ultimately been unsuccessful. My belief is that the great majority of litigants would be content with a patient hearing before a judge, and to abide by his decision. Indeed they now, with respect to most mercantile contracts, voluntarily agree to leave a matter, which is often of very great pecuniary importance, to the decision of one man of whom they have no knowledge, and in whom they have no confidence, who may be selected by lot as umpire. It will be borne in mind that the usual arbitration clause in contracts provides for disputes being settled by two arbitrators or by one chosen as their umpire. The arbitrators are in practice partisans, and they select an umpire, and the disputants have no voice in the selection.

I believe that, as a rule, suitors have implicit confidence in the judges, not only as respects integrity, but ability and sound judgment also.

Lord Justice James was in the habit of saying, "A judge is not necessarily a fool!" And Lord Blackburn said that the right of appeal should be restricted so as merely to prevent the judge being a despot. This was practically the case under the old Bill of Exceptions.

Great as are the improvements which have been made since I began to practise—notably the simplification of pleadings, the competency of the parties and others interested to give evidence, the facilities for the inspection of documents, the removal of the restricted jurisdiction of different Courts, and the consequent occasional sending the suitor from one Court to another, the advantage to an ordinary litigant has, in a very great number of cases, been counterbalanced by the unrestricted right of appeal, and especially, as I have said, by the encouragement to the exercise of that right in rewarding the successful appellant by giving him, not only the costs of the appeal, but the whole of the costs in the Court, or it may be in several Courts, below. Further, although it has always been the practice for judges to

give more or less deference to the view of a jury—in fact, in the old days the verdict was never set aside unless the judge who tried the case was dissatisfied with it—no weight, or very little weight, is now ordinarily given to the opinions expressed by judges, however eminent, in the Court below, either as to the law or the facts, and even when the question is one of extreme difficulty, and the judges in the Court of Appeal express great doubt whether the decision appealed from was not right, they do not hesitate to reverse it if the balance of their opinion is in favour of doing so. It would seem more reasonable to apply to questions on appeal the old rule as to verdicts of juries which were ordinarily upheld, unless they could not be right, and not to reverse a decision which was not deemed obviously wrong. The ordinary suitor does not understand why he should be concerned in settling the law for any case beyond the one in which he is engaged.

Although the amount of costs which, under the present system, may possibly fall on the un-

successful litigant, amounts to a scandal, litigation must, doubtless, always be costly, and more so than it formerly was, notwithstanding improvements which have in several respects tended to lessen costs. When it is necessary to rely on skilled expert evidence, the costs are naturally greatly increased, and this is aggravated by the greater length of trials, involving various payments day by day. In my own experience I have known the fees of one expert witness amount, in one action, to between six and seven hundred pounds. Such witnesses are in reality advocates rather than witnesses, and Lord Campbell, recognising this, introduced a bill in the House of Lords providing that such witnesses should not be sworn. I think a judge might often lessen expense if he would bear in mind how costly some witnesses are, and endeavour to save their attendance when not really necessary.

It may well be doubted whether ordinarily the oath influences or controls the evidence of such witnesses; but I can refer to an instance in which it admittedly did so. A question of

some importance arose as to the proper description of merchandise which was objected to by the buyer. The matter was referred to mercantile arbitrators in the usual way. A well-known colonial broker, of good repute, gave evidence unsworn before the arbitrators in favour of the seller. The arbitration proved abortive, and ultimately the question came on for trial before a jury. The broker referred to was called as a witness, and was, of course, sworn. He then gave evidence contrary to that he had given before the arbitrators. On my expressing surprise at this he coolly remarked that before the arbitrators he was not sworn, but before the jury he was compelled to speak the truth! This was said without any apparent sense of shame by a man of great business experience, in whom much confidence was placed.

The view of the Judicature Commission was that the judge should have absolute discretionary power over the costs. This was somewhat modified by an amendment inserted in the bill in the House of Commons, and in practice there

appears to be great disinclination on the part of some judges to exercise the power which, in this respect, they possess, although that power is, no doubt, somewhat restricted. It is not uncommon for a judge to say that the action is one which should not have been brought, but at the same time to refuse to deprive the plaintiff of his costs, whereas the logical result would seem to be that, if the action was one which ought not to have been brought, the plaintiff should not only be left to pay his own costs, but should also pay the costs to which he has unjustifiably exposed his opponent. The present system seems to favour frivolous and fraudulent claims. I recall a case in which the plaintiff claimed very heavy damages from a railway company, alleging, and calling a body of evidence to prove, that he was most seriously and permanently injured; but on the part of the railway company it was clearly proved that the plaintiff was shamming, and that symptoms relied on by the plaintiff arose from self-inflicted acts. Ultimately the plaintiff had a verdict for thirty pounds instead of the thousands

which he claimed, and to which he would have undoubtedly been entitled had his case been true. But although the plaintiff was practically convicted of gross fraud, he recovered his full costs, and of course the railway company had to pay the whole of the expense of exposing the fraud.

CHAPTER VI

ADMINISTRATION OF JUSTICE IN THE PROVINCES

THE circuit system has long been generally condemned, and probably few lawyers would defend the present arrangements for the administration of justice in the provinces. It is remarkable that so little effect has been given to the recommendations of the great majority of the members of the Judicature Commission, seeing that that majority included Lord Hatherley, Lord Selborne, Lord Bramwell, Lord Justice James, Sir John Karslake, and other eminent men. When there were no facilities of communication it was obviously natural that assizes should be held in each county, but even then there was often difficulty and inconvenience in getting to and from the assize town, although it was generally near the centre of the county. But since the introduction of railways the facility

of communication does not depend on the position of the town, but rather on the means of access to it, and in many instances the assize towns are by no means easily accessible even for purely local business. It has been my lot to be engaged, in days gone by, in a considerable number of causes tried at the assizes in Surrey. The great majority of those cases have been London actions taken for trial to Surrey for the purpose of expedition, and to avoid the delay of trying them in London. A great number of London causes were so tried at every assize, to the inconvenience of every one, and at increased cost to the litigants. Indeed, it was the height of absurdity, for during the assizes at Kingston a special train was run from Waterloo Station to Kingston, and in that train might frequently be seen the judges and the barristers, the solicitors, the suitors, the witnesses, and often the jury, as the majority of the special jurors summoned in Surrey naturally came from the suburban places in the neighbourhood of London, such as Clapham, Camberwell, etc. In the evening the return journey was made, with

the like occupants, the process to be repeated the following day and on many subsequent days.

The assize business in Surrey is an illustration of the absurdity of the system which prevailed, but the evils of that system were not confined to the County of Surrey. Actions were tried in counties with which the subject of the litigation had no kind of connection, merely because there was not the opportunity of trying the case where the cause of action arose, or because it was more convenient to try it elsewhere. Many years ago I ventured to remark that it was to a great extent a question of Bradshaw. Lord Bramwell on several subsequent occasions expressed the same view in the same language. Reverting to the familiar instance of Surrey, I was engaged in a purely local action as to boundary and right-of-way in relation to property at Norwood. There were many witnesses; the case was tried at Kingston; the witnesses had to come from Norwood to London, and thence to go to Kingston by the special train to which I have referred. In

another local action as to boundary, in which I was engaged, the question related to property at Reigate, and the witnesses had to come to London in order to attend at Kingston Assizes. I recall a third case of the same nature in which I acted. The question was as to property at Weybridge, and the witnesses came to London on their way to give evidence at Croydon, where the Surrey Assizes were in the summer held in alternate years. I think it must be admitted that the above instances go far to show that the geographical boundaries of counties are not necessarily a safe guide as to convenience, and that it is to a certain extent a question of Bradshaw. The restricted sittings of the Courts in London not only caused a great number of purely London cases to be tried in Surrey, but led to such cases being also tried at a greater distance. Bristol was usually the last place at which causes could be tried before the long vacation, and if the plaintiff was too late to enter the cause for Surrey, it was frequently taken to Bristol. I often had to go to Bristol Assizes, but in every instance for

a London cause which had nothing whatever to do with Bristol.

Consequent on the removal of the restrictions as to the sittings of the Courts in London, the scandal of taking London cases to country places for trial has passed away, but not wholly to the advantage of the suitor. The object of a plaintiff in taking his case to an assize town was to avoid delay. I could instance many cases which were then tried and disposed of within little, if any, more than a month after they were commenced. The advantage of the increased facilities for trial in London has been off-set by enormous delay in the trial of the action.

No one can, I think, doubt that the arrangements for the local administration of justice are obsolete and urgently require change. The original idea apparently was that each geographical county had equal rights and should have the same facilities. Thus two judges of the Common Law Courts went twice a year to each county. Huntingdonshire, Rutland, and Westmorland had the same provision as Yorkshire, Lancashire, and

Warwickshire. No doubt, something has been done in the most glaring instances to lessen, but not wholly to remove, this absurdity. The business at most assize towns has, from a variety of causes, greatly decreased. This decrease arises partly from the greater facility for trying cases in London, and partly from the extension of the jurisdiction of the County Courts. There is, moreover, an indisposition to try causes at the assizes consequent on the insuperable difficulty of allowing adequate time for the trial of cases at a small assize town, where it often happens that if one case has taken longer than anticipated, others are unduly hurried or postponed. On the other hand, if a case, supposed to be one which will take considerable time, collapses, much time is inevitably wasted.

The published life of Lord Russell of Kilowen, the late Lord Chief Justice of England, contains a practical illustration of the present system as disclosed by the last circuit to which that eminent judge went. It is true that at the time he was seriously ill, and that he died shortly after the

termination of the circuit; but his state of health in no way affected the business to be transacted, and consequently does not impair the force of the illustration. It may indeed safely be assumed that had there been work to be done, hardly any amount of bodily ailment would have deterred him from doing it.

5th July 1900.—The Chief Justice left London for the North Wales circuit.

6th July.—The Commission was opened at Newtown. There was no business of any kind, and the judge received a pair of white gloves.

7th July.—Sunday

8th July.—No Court.

9th July.—At Dolgelly there was no business, and the judge was presented with a pair of white gloves.

10th July.—No Court.

11th and *12th July.*—Sat in Court at Carnarvon.

13th and *14th July.*—No Court.

15th July.—Sunday.

16th July.—At Beaumaris—no business—judge had white gloves.

17*th July*.—No Court.

18*th July*.—Sat in Court at Ruthin for four hours and three-quarters.

19*th July*.—Sat in Court for five hours.

20*th July*.—No Court.

21*st July*.—Sat in Court at Mold for about three hours.

22*nd July*.—Sunday.

23*rd July*.—No Court.

24*th July*.—Sat in Court at Chester.

25*th July*.—Sat in Court until one o'clock and returned to London.

It is hardly necessary to say that the distinguished Chief Justice was in no way whatever responsible for this waste of valuable time, for so long as assizes are held at insignificant towns, some days must be allotted to each. There never was a more energetic judge than Lord Russell, nor a man who, when at the Bar or subsequently, more invariably did what he deemed right in the interest of the litigants, regardless whether what he did or said would be pleasing to his clients or others.

It is to be borne in mind that at each of the assize towns above referred to, whether there was any business to be done or not, some forty or fifty gentlemen had been summoned to serve on the grand jury—probably about the same number to serve on a special jury, if they should be required—and a still greater number of jurymen to serve on the common jury either in a Civil Court or for the trial of prisoners. Moreover, all the paraphernalia incident to an imposing Court of Justice had been prepared, and numerous officials and employees were necessarily in attendance. But in many instances, as the result proved, the sole business was the presentation of a pair of white gloves to the learned judge. It may be that the sight gave a certain amount of amusement to some who had nothing else to do, and probably brought some money into the town; but undoubtedly it was no light matter for many summoned as jurymen to come at their own expense, and without any remuneration whatever, to, in some instances, a town at a considerable distance, and to neglect their ordinary avocations

for the purpose. But the time and money thus wasted are not the only consideration. The services of the judge thus compelled at no little personal inconvenience to travel to remote parts of the country, are urgently required elsewhere for the disposal of really important cases, involving perhaps large sums of money more or less in jeopardy, or it may be questions of character, which it is all important to those interested to clear.

It may be that the objections of the judges on personal grounds to the circuit system are not now so great as they were when the business at most assize towns was greater than it now is, and when the judges had to pay their own circuit expenses, which were very considerable, but probably the views of judges differ as to this. On several occasions at meetings of the Judicature Commission, Lord Bramwell said he did not wish to dwell on the drawbacks to the position of a judge, but it might not be generally realised that twice in the year the judge was for four or five weeks taken from his home and had to

live in uncomfortable lodgings, in the forced company of three other men—one of whom was probably a stranger to him—and another whom he probably disliked. Lord Bramwell of course referred to his brother judge and that judge's marshal!

The mode in which the criminal business of the country is transacted is indefensible, and involves unnecessary consumption of the time of eminent judges when their services are urgently required elsewhere. They go from town to town, and are frequently engaged in only trying prisoners who could, and ought, to be tried at quarter sessions. There seems no good reason why the jurisdiction of the quarter sessions should not be in some respects amended, and provision seems desirable to insure that the presiding Chairman or Judge should be well qualified. It occasionally now happens that he is far less so than the Recorder of the Borough or the County Court Judge, who may have spare time, and who may be on the spot. It would seem natural that the County Court or District Judge should ordinarily

be chairman. But whether a change is made as to chairmen or not, there is no necessity for a judge of the High Court having to try prisoners who would have been tried at the preceding sessions, had they been committed in time. The system of the Central Criminal Court works very satisfactorily, and there seems no reason why it should not be extended. These sessions are held periodically, and a judge of the High Court attends for the trial of the more serious cases, and only deals with those cases. There could be no difficulty whatever in extending this system. For instance, if, say at Reading, a prisoner was to be tried for murder, a judge of the High Court could go there almost as easily as to the Old Bailey. If in the next town, Oxford, there was no serious charge, it would not be necessary for the judge of the High Court to go there. It is, of course, always known beforehand what criminal cases are for trial.

Although the system which requires assizes to be held in each county is utterly indefensible, it by no means follows that the assize system should

be wholly abolished. On the contrary, it is clear that in some parts of the country increased facilities should be given for the trial of civil actions, and also for the trial of prisoners. The requirements are known—civil business will arise where there are large commercial operations, and criminal business is generally to a great extent in proportion to the population. The old cry of bringing justice to every man's door is in these days really nonsense, and there is no foundation for the suggestion that it would be necessarily unfair to a prisoner to have to take his witnesses over the borders of the county in which he and they dwell. The Central Criminal Court constitutes a complete answer to this suggestion. No one denies that it works well. It is unquestionably easier for witnesses from Clapham to come to London than it would be to go to Guildford, and for witnesses from Greenwich to come to London than to go to Maidstone. It is really, both as respects criminal as well as civil business, a question of Bradshaw—in other words, facilities of communication — and the borders

of the county have nothing whatever to do with it.

I had experience in another London case, tried at Guildford, which exemplified the inconvenience of trying London mercantile actions there. The case was not reached on the day anticipated, and it stood first in the list for the following day. The broker who had made the contract was a friend of the defendants, but was an essential witness for the plaintiff. He was in attendance when the case was expected to come on, but when it was found that it would not be taken until the following morning, he said he should return to London and return in the morning before the sitting of the Court. He was warned that his evidence was essential. When the case was called on the following morning, he sent a medical certificate stating that he was unwell and unfit to travel. Consequently, the record had to be withdrawn and the trial postponed. I brought an action against him to recover the costs thus occasioned, which were very heavy. The case was tried before Lord Campbell at the Guildhall,

when it appeared that on his return to town the witness had taken two calomel pills, and the next morning had obtained a medical certificate of his unfitness to travel. The jury found a verdict for the loss sustained by reason of the non-attendance of the witness.

A most serious consequence of the present system is the delay which is frequently caused in the trial of accused persons. A crime may be committed near the borders of County A on or immediately before the last day of the assizes for that county. The judge may be going to hold the assizes in the adjoining County B—distant perhaps, by railway, some half an hour from the assize town in County A, and nearer the locality where the crime was committed—but the judge cannot try the case in County B, and the accused has necessarily to remain in custody for many months before he can be tried. A short time ago I happened to be sitting at petty sessions at Tonbridge. Two lads were brought up in custody, charged with house-breaking in the day-time. It was not a very serious matter—one at least of

the accused had entered a house in the temporary absence of the servant-girl in charge, and had partaken of some cold rice pudding. The magistrates at petty sessions could not dispose of the case, and were bound to commit the accused to the quarter sessions. Those sessions had terminated the previous day, and consequently the lads were kept in goal three months before they were tried, and then one of them was acquitted. No application was made for bail, and it was not a case for bail, for the accused were not apparently members of an exemplary class, and had no fixed residence. This case exemplifies the absurdity of the system in another way. Although the quarter sessions for the county at Maidstone had just terminated, the quarter sessions for the borough were to be held a day or two afterwards before the recorder, a well-known King's Counsel with exceptionally great experience of criminal law. But although the above case could have been heard at Maidstone in a few days before a highly competent tribunal, it had, by reason of the rules as to boundaries,

to be deferred for three months, and then to be tried in the same town, the prisoners in the meantime being maintained at the expense of the county, and one, as must be assumed from the result, unjustly detained in prison for three months.

The system which involves the appointment, in every small corporate town, of a recorder with jurisdiction limited to the borders of the particular borough, is a manifest absurdity. At Maidstone and at many other towns the recorder holds his Court in a building distant only a few yards from the building in which the quarter sessions and assizes are held, and it frequently happens that the recorder who has travelled from London to the town of which he is recorder, which he does four times a year, finds that there is nothing whatever to do. He receives the proverbial white gloves and straightway goes back to London. The office of recorder is, however, not only an ancient office, but in some places a very important one; notably in London and Liverpool, but London shows the absurdity of the limited

jurisdiction which prevails elsewhere. In London the recorder (although an officer of the corporation as in other places) has jurisdiction over an extended area far beyond the city of London or the county of London, and exercises it to the great advantage of the community. Although this extension of jurisdiction has long given general satisfaction, no one seems to have seriously suggested that the same beneficial change should be made elsewhere.

Not only is there no need of a recorder at a vast number of places which are visited by such an official, but where there is such need it will generally be found that in an adjacent building there is a County Court judge with his time not fully occupied, who would, in most cases, be at least as competent to deal with the borough business as the recorder, and who is on the spot, and often with plenty of spare time on his hands. Referring by way of illustration to one very limited district, different recorders go, or are supposed to go four times a year to hold sessions at Sandwich, at Deal, at Dover, at Folkestone,

and at Hythe. Sandwich is distant about four miles from Deal; Deal is about eight miles from Dover; Dover is about eight miles from Folkestone; Folkestone is about four miles from Hythe. And yet the whole paraphernalia of separate Courts with a different judge is provided four times a year at each of those places. It would be interesting to have a return of the business transacted at these respective borough sessions. It is hardly necessary to say there is direct railway service between each of the above places, and that thus they are within a few minutes from each other.

The County Court system vies in absurdity with the other systems. When the County Courts were established sixty years ago, there was little, and, in many instances, no railway communication, and following the old and now obsolete assize principle, it was thought that justice should literally be brought to every man's door, and, consequently, that County Courts should be provided in each geographical county, irrespective of population and of business and probable requirements. The result is that the

County Court judge has, in many cases, to travel to comparatively small villages, in remote districts, to hold a Court, and when he gets there he finds there is nothing whatever for him to do. In a vast number of instances the returns show that if there is any business to be transacted, it can be, and is, disposed of in a few minutes. All this involves not only waste of the time of the judge, who is not unremunerated, but a Court has to be provided and prepared, and certain officials in attendance, involving expense which has to be provided for. In the result there is well-founded complaint that the fees which the impecunious suitors in the County Courts have to pay are oppressively high, and are, in fact, far higher in most cases than the fees payable in important cases in the High Court. All this arises in great measure from not considering Bradshaw. No doubt there is at many places more business than the judge can satisfactorily get through within the allotted time, but this seems only to exemplify the absurdity of the system, and to show the urgent need of readjustment.

The anomalies of the County Court system are not confined to locality. All County Court judges have now jurisdiction in common law cases up to one hundred pounds, and in equity cases up to five hundred pounds. In these days it is by no means easy to distinguish between an equity and a common law action. Some judges have, and others have not, jurisdiction in admiralty cases, involving considerable amounts; also in bankruptcy, where it occasionally happens that the amount at stake is very considerable, and there is no limit to the jurisdiction. I have myself been engaged in bankruptcy cases involving very large sums. In one case, which occupied the Court (not a County Court) several days, the result involved to my client a sum of upwards of one hundred and fifty thousand pounds.

As respects the ordinary jurisdiction of the County Court it is not easy to understand why it should arbitrarily be limited by a given amount of money. If a judge is competent to deal with a case involving intricate questions of law and fact, where the amount at stake is one hundred

pounds, there seems no valid reason why he should not have power to decide when the claim is one hundred and one pounds, and when, perhaps, there is no real difficulty either as to the law or the facts. But the question of jurisdiction gives rise to a most extraordinary state of things. If the amount claimed is one hundred pounds, and the evidence is very conflicting, and its effect open to much doubt, the view of the judge of the County Court as to the facts is final, and no appeal from his decision is possible, whereas if the amount claimed is one hundred and one pounds, the case has to be tried by a judge of the High Court, and whether the result of the evidence is open to reasonable doubt or not, there is an unrestricted right of appeal from the decision, even although the judge is the Lord Chief Justice or other judge of exceptional experience; and not only to the Court of Appeal, for although the judges of that Court may be unanimous against the appellant, it is competent for him further to appeal to the House of Lords.

A further absurdity of the present system is

that the practice in the High Court and in the County Court entirely differs, and apparently for no conceivable reason. Things are throughout called by different names. The Court fees differ, being generally higher in the County Court than in the High Court. The registrar of the County Court has certain restricted powers as to proceedings in that Court, but if, as very often happens, he is also district registrar of the High Court, he has practically far greater power than the judge of the County Court, for he may order judgment to be given against a defendant for any amount of money. Another extraordinary thing is that in many instances the remuneration of the registrar of the Court is far in excess of that of the judge of the same Court.

For the purpose of ascertaining the views of the County Court judges as to the right of appeal from the County Court, which it was suggested should be given, the Judicature Commission issued questions to each of the judges of the County Courts, asking their opinion as to whether or not there should be a power of appeal from the County

Courts to the High Court. The answer of one of the judges, a well-known and learned Queen's Counsel, who when at the Bar had not enjoyed a very extensive practice was: "Certainly not. It would be an appeal from a superior to an inferior tribunal. The judges of the County Courts are far more competent from their experience and legal knowledge to form an accurate opinion than the judges of the so-called Superior Court." The County Court judge who sent this impertinent reply was requested to withdraw it, which he did, and consequently it was not printed in the proceedings.

It seems abundantly clear that the whole system as to the local administration of justice urgently requires radical change. There is, I think, no good reason for the County Courts being distinct tribunals from the High Court, instead of being branches of that Court. Nor can I understand any justification for the limit of jurisdiction to one hundred pounds. It is either too high or too low. It may be that in some cases one hundred pounds is a sum important to

the suitor—to others it is of no importance. The County Courts were established for the purpose of affording a speedy and inexpensive means of enforcing really small claims. Now the jurisdiction is of a nondescript character. There seems no reason why the cases involving inconsiderable amounts should not be decided by the registrar, who, as I have said, has in many cases most important jurisdiction as an officer of the High Court, and who could doubtless be relied on to give a patient and fair hearing. The judge would thus be free to deal with cases of real importance, and I can see no reason why his jurisdiction should be limited to any pecuniary amount. If both parties to the litigation are content that he should try the case, it seems absurd that he should not have power to do so. Of course in any case of real difficulty there would be power for a judge to order the case to be transferred to another Court. Any such change would enable the number of the judges of the County Courts to be greatly reduced. In fact, it would seem to be desirable to abolish the office of County Court judge and

to create district judges of the High Court to act in different centres with facility of access so as to meet the requirements of the district. It would, doubtless, be necessary, in order to secure the services of really efficient judges, that their remuneration should be considerably in excess of that now paid to County Court judges, but it by no means follows that the aggregate expenditure would be increased. On the contrary, the reduction in the number of judges would greatly diminish it.

If Courts were thus constituted, they would be branches of the High Court, with no limit of jurisdiction and with the right of appeal as in other branches of the High Court; but supposing the present County Court system to continue, it does not seem to follow that the jurisdiction should be necessarily limited. It may perhaps be said that with the consent of both parties the County Court judge has power to deal with disputes to any amount, but it is by no means easy to induce litigants, or potential litigants, to agree to anything. A remarkable confirmation

of this is to be found with respect to the trial of actions at law by a judge without a jury. At a time I recollect, the trial was necessarily before judge and jury, whether any facts were in dispute or not. An act was passed enabling a judge, with the consent of both parties, to try the action without a jury. This proved almost a dead letter. Very few actions were so tried, because the litigants would not consent; but subsequently power was given to the judges to try the case without a jury, unless either litigant asked for a jury. The practical result of this change has been that more actions are now tried by a judge without a jury than with a jury. This arises from no consent being required.

It may be said that the jurisdiction of the County Court judges with respect to judgment summonses forms a serious objection to any such change as has been suggested. It seems by no means clear that lessening the facilities for the exercise of that jurisdiction would be a serious evil. It is certainly illogical to send a working man to prison because he does not pay

a debt, and thus to deprive him from earning the money necessary to do so. Moreover, I believe that it by no means follows that the merits are always on the side of the judgment creditor. It is not easy to understand why a money-lender or unscrupulous tradesman should be able to send a man he has trusted to prison, to be there maintained at the expense of the ratepayers. The law of some countries in which imprisonment for debt is permissible that the creditor must day by day pay for the maintenance of the man he has sent to prison seems but reasonable. In theory imprisonment for debt in this country does not exist, but practically it does, and in a very uncertain, and at times oppressive and objectionable form, based on the fiction that it is not imprisonment for debt, but for a kind of contempt of Court! The extraordinary difference in the way this jurisdiction is exercised by the County Court judges seems in itself to condemn it. Magistrates at petty sessions have power to commit a man to prison for a limited period for non-payment

of rates and taxes and other money demands, and if it is deemed necessary to retain imprisonment as a means of enforcing payment of small judgment debts, there seems no good reason why a debtor who can pay, but won't do so, should not be subject to the same jurisdiction as a man who fails to pay parochial rates or taxes, or allowance to a wife under a separation order, or wages to a servant. The magistrates at petty sessions would often have better means of forming an opinion as to ability to pay than the County Court judge.

CHAPTER VII

UNDESIRABLE EFFECT OF EXISTING LAW IN SOME INSTANCES

Although the judges in Court usually speak of another judge as "my brother So-and-so," it does not seem to follow that there is necessarily any strong brotherly affection between them. Lord Bramwell was fond of describing a conversation which took place between himself and Lord Blackburn, with reference to the dinner given in his honour on his retirement. Lord Bramwell was not only an eminent judge, but he was a popular one in the profession. Lord Blackburn was also an eminent judge, but he was not universally popular. Lord Bramwell said that on the day of the dinner, he happened to meet Lord Blackburn. He (Lord Blackburn) said:

"I am not coming to your dinner, Bramwell." Lord Bramwell said: "I did not suppose you were." Lord Blackburn: "No, I do not like such things. When I retire I shall do so in vacation." Lord Bramwell: "My dear Blackburn, it will be a very unnecessary precaution!"

On one occasion I perhaps unjustifiably took advantage of a known coolness between two eminent judges. In a case of *Potter* v. *Rankin*, Mr Justice Willes (Sir James Shaw Willes), who was undoubtedly one of the most distinguished lawyers of the last century, had delivered a very elaborate and learned judgment in the Court of Common Pleas in favour of the defendant. There was an appeal to the Exchequer Chamber. The case was first in the list for the day in that Court. When waiting for the judges to come into Court Mr Mellish (afterwards Lord Justice Mellish), who was counsel for the defendant, asked me if I would consent to the case standing over until the next sitting of the Court, saying that, as the Court was then only going to sit for two

days, it would be impossible fully to argue the case in that time. I said I saw no objection to his suggestion, but would speak to Sir George Honyman, who was counsel for the plaintiff, and who had not then come into Court. He did so almost immediately afterwards, and when I was speaking to him on the subject, I noticed that the clerk of the Chief Justice (Sir Alexander Cockburn) had brought in the papers of that learned judge, who was not expected to be sitting in that Court. It was notorious that the relations between the Chief Justice and Mr Justice Willes were somewhat strained. I suggested to Sir George Honyman that we had better not consent to postponement, inasmuch as the Chief Justice would not be indisposed to differ from Mr Justice Willes. Consequently, the case went on, and obviously there was no indisposition to criticise the judgment delivered by Mr Justice Willes, and in the end the judgment was reversed. There is however, no ground whatever for suggesting that that reversal was not right. It was in my client's

favour, and was upheld on appeal to the House of Lords.

The above case of *Potter* v. *Rankin* illustrated the anomalies of marine insurance law. That law is of course, in theory, based on securing indemnity to a shipowner or merchant who has lost his property, and is not supposed to make it to the interest of the owner that it should be lost—still less is it intended to protect a man who, as Chief Justice Erle once in his summing up said, equips and loads his ship and despatches her "with earnest prayers that she may soon reach the place of her destination — that being the bottom of the sea." The case of *Potter* v. *Rankin* had reference to a sailing-ship named the *Sir William Eyre*, and the conduct of all parties in relation to the matter was *bonâ fide* and straightforward, and no suggestion to the contrary was ever made. The value of the vessel when she sailed from this country was admittedly about ten thousand pounds. She was chartered for a voyage from London to New Zealand, and thence to Calcutta, and the owners

subsequently entered into a charter-party for a homeward voyage from Calcutta to this country. The owners effected a policy of insurance on the ship in the usual form for ten thousand pounds for the outward voyage to Calcutta *viâ* New Zealand. They also effected a policy for four thousand pounds on homeward chartered freight from Calcutta to London. There were some other policies which it is not necessary to mention, as they were not the subject of litigation. When at Dunedin on her outward voyage, the vessel met with an accident, and was seriously damaged, but the extent of her damage could not be ascertained at Dunedin, nor could the vessel be repaired there. In accordance with the advice of surveyors, she ultimately proceeded to Calcutta, and in due course arrived there without having met with any further disaster. At Calcutta she was put into dry dock and surveyed, and the surveyors reported that the injuries were so serious that it would cost more to repair her than she would be worth when repaired, and thus she was a constructive total loss. The

shipowners thereupon gave notice of abandonment to the underwriters on the policies for ten thousand pounds and four thousand pounds, and claimed payment of a total loss under each policy. The ten thousand pounds policy was effected with London underwriters, the four thousand pounds policy with Liverpool underwriters. Both sets of underwriters denied liability, and maintained that the vessel was not a constructive total loss, and, further, that the shipowners were prevented from so claiming by reason of the delay in giving notice of abandonment. The underwriters having refused to accept the abandonment, the ship remained the property of the owners, and they, knowing that the ship if repaired must be at Calcutta for some time, effected a policy for eight thousand pounds with a third set of underwriters for three months while lying at Calcutta. Shortly after this the vessel was driven ashore at Calcutta in a cyclone and became a complete wreck. In the meantime the action of *Potter* v. *Rankin* was tried, and the Court of Common Pleas in the judgment delivered by Mr Justice

Willes decided that the plaintiffs could not recover in consequence of the delay in giving notice of abandonment, but as I have said, that judgment was reversed by the Exchequer Chamber, and the judgment of that Court was affirmed by the House of Lords. Thus the plaintiffs had judgment for the four thousand pounds under the policy on homeward chartered freight. In the meantime the action on the outward policy for ten thousand pounds came before the Court of Common Pleas, and was argued before the case in the Exchequer Chamber had been heard. The Court of Common Pleas naturally adhered to their previous decision, that the underwriters were not liable for a constructive total loss by reason of the delay in giving notice of abandonment, but the Court held that the vessel was justifiably taken to Calcutta for repairs, and that the underwriters were liable to pay such a sum as would have been the amount of the total expenditure in repairing the vessel had she been repaired at Calcutta, and the Court referred the matter to a well-known average adjuster to fix the amount

which the plaintiffs were on the above principle entitled to recover. In the result the plaintiffs recovered judgment for about seven thousand pounds on the ten thousand pounds policy, although the repairs had not been done and the seven thousand pounds had not been expended. The plaintiffs did not appeal against the decision of the Court of Common Pleas in the last-mentioned case, as that decision was more favourable to them than if the Court had decided that the plaintiffs were entitled to recover for a constructive total loss. Thus the decision left the plaintiffs in the position of owners of the vessel at the time she was knocked to pieces, and in an action on the eight thousand pounds policy, the jury found that, although greatly damaged, the vessel was seaworthy for the purpose of lying at Calcutta, and the plaintiffs recovered judgment on the eight thousand pounds policy. The remarkable result was that, in a case admittedly *bonâ fide*, the plaintiffs, as compensation for the loss of a ship worth ten thousand pounds, recovered judgments for nine-

teen thousand pounds, in addition to some minor policies which were not the subject of litigation.

I have been concerned in many other cases in which the underwriters have had to pay for more than the loss actually sustained, but in those cases the result has arisen from the recognised over-valuation of the subject matter of the policy, and not from such a peculiar combination of circumstances as arose in the case of the *Sir William Eyre*. It may possibly be of interest to refer to one case tried before Sir Alexander Cockburn, when Chief Justice, at Kingston. A steamship had been valued in the policy at thirty thousand pounds The vessel sustained very serious injuries at sea, for which the underwriters were admittedly liable, but the shipowners claimed the thirty thousand pounds on the ground that the vessel was a constructive total loss, in other words, that the cost of repairing the damage would exceed the actual value of the ship when repaired—not the value in the policy. There was much conflict of evidence as to this. During the trial the Chief Justice

called Sir George Honyman, who was leading counsel for the plaintiffs, and Sir William Baliol Brett, then Solicitor-General (afterwards Lord Esher), who was specially retained for the defendants, up to the Bench, and suggested terms of compromise which Sir George Honyman said he could not advise the plaintiffs to accept, as they sought to recover the whole thirty thousand pounds, although that sum was admittedly about double the value of the vessel when she was insured. Sir Alexander Cockburn was very indignant, and said quite audibly: "Then I'm d——d if they shall have it, if I can prevent it." Sir Alexander Cockburn adjourned the trial in order that the underwriters might, if they thought fit, amend their pleadings by disputing the validity of the policy. The underwriters, however, on being consulted, very honourably declined to adopt that course, inasmuch as there was no suggestion of improper or unfair conduct, and they had had the premium on the amount in the policy, and the trial proceeded; but as the question raised was very complicated, it was ultimately referred to an

eminent member of the Bar, and in the end the plaintiffs succeeded.

It seems manifestly objectionable on public grounds that under any circumstances a shipowner should derive pecuniary benefit from the loss of his vessel, that loss in many instances imperilling, if not causing, loss of life. Although it seems difficult to defend a law which permits this, the practical evil is, doubtless, much less than it was. This arises in part from the general practice which now prevails of insuring sailing vessels in mutual clubs, and partly because the shipping trade is now chiefly carried on by steamships, and these vessels are ordinarily owned by companies or by private owners of good repute. There are now probably comparatively few of the impecunious private owners who owned small sailing vessels which were mortgaged for more than they were worth, and to whom therefore the loss of a vessel heavily insured was a thing to be hoped for. I believe I, many years ago when giving evidence on this subject, said that the law operated as a temptation to a shipowner to expend as little as

possible in repairing and equipping his vessel for a voyage, to load her as deeply as practicable, to insure heavily, and to feel that if the vessel reached her destination he should do well, and that if she went to the bottom of the sea he should do better. I am far from suggesting that this class of ship-owner was ever numerous, but they certainly existed. The objections to the law still exist, but the practical evil is, doubtless, much less than it formerly was. The following is an instance of the class of men to whom I have referred. A sailing vessel, belonging to a very well-known and plausible but impecunious owner, happened for three consecutive voyages to be chartered by clients of mine (of course different clients and in different trades); on each of these three voyages the vessel put into a port of refuge and sold the whole or part of the cargo. When called upon by the charterers to compensate them, the owner urged his inability to pay, and said that his ship was mortgaged for more than she was worth. Indeed his solicitor, who was a well-known and highly respectable man, on one occasion called on me

and said: "You are again attacking old ——. He called on me yesterday and said: 'Mr ——, you have known me a long time, and you know I have an advantage over most other men—I have neither money, character, nor conscience.'" I believe that in thus describing himself he was more than usually accurate. And yet that man was constantly to be seen in the city with a smiling face. It sometimes happens that poverty is a useful weapon in defence.

Frauds on underwriters are by no means confined to maritime risks. It seems to be generally accepted that in a very large proportion of the cases in which claims are made under fire policies, the fire has not been accidental; but it is extremely difficult for an insurance company to prove arson, and it is manifestly dangerous to suggest it without the necessary evidence. Considerable ingenuity is sometimes displayed by those who have insured their property in excess of its value. I have been informed that there is a recognised practice of putting tow steeped in turpentine in different parts of the house and of

placing on the tow candles to burn a certain number of hours. Having lighted the candles, the assured goes with his wife to a theatre, or it may be to chapel, or possibly to Brighton. In any case, he arrives at his house in a cab at the time it is known it will be in a blaze, and can truly say he had been absent for several hours before the fire broke out. In my experience, it generally happens when there is suspicion as to the cause of a fire, that the assured has been unfortunate enough to have had a previous fire.

Fraudulent claims under life policies, although not so frequent, are by no means uncommon. I have known much ingenuity shown in cases of suicide to conceal the cause of death, and to make it appear to have been the result of an accident, or from natural causes; also, in proposals for insurance, care taken to conceal dangerous disease. Many years ago I obtained possession of a letter written to an agent in the country, of a well-known insurance company. The letter was from a friend to the agent, and was to the following effect:—

"I see you have been appointed agent to a London Insurance Company. Poor —— is in a very bad way and cannot last long. I do not know what is to become of his wife and children. Now you and I might do an act of great kindness by obtaining a policy on his life. I will pay half the premium if you will pay the other half."

Thus the writer apparently thought he was suggesting a laudable thing, and did not appear to have realised that he was proposing a fraud on the insurance company. Policies effected by a man who has determined to commit suicide are, I think, much more common than is generally supposed. I have met with several of such cases, in which there has been considerable ingenuity to conceal the cause of death.

I recall a remarkable case of suicide not connected with life insurance. A man who had been largely engaged in London, in speculations in the corn trade, suddenly disappeared, and it was then found that he had obtained large sums from bankers and others against Bills of Lading which were found to be forged, and had committed other extensive frauds. Clients of mine, who were

largely interested, caused him to be adjudicated bankrupt, and offered a reward of five hundred pounds for his apprehension. After some time the police discovered that he was in Spain. There was then no extradition treaty with Spain. Lord Granville, then Foreign Minister, was seen, but said that in the absence of a treaty he had no power, but as the case was one of magnitude and serious importance, he would give a letter to the British Minister at Madrid, if the police liked to go there. The police went to Madrid, and were in like manner told by the British Minister there that he had no power; but he gave a letter of introduction to the Spanish Minister of State, who gave the police a letter to the Municipal Principal of Barcelona, where the accused was supposed to be staying. That official said he could do nothing, but would instruct the Spanish police not to interfere with anything the London police might do. Accordingly, the London police went to the hotel, where the accused was living in comfort, and arrested him, notwithstanding his protests that in the

absence of a treaty they had no power to do so, and that he had been so advised by his solicitor in London. In spite of his remonstrances and calls for help, the London police carried him (he was a little man) through the streets of Barcelona, and took him on board an English steamship bound for Liverpool. One of the London police was, of course, always with the prisoner, so as to keep him under strict control. The vessel arrived in the Mersey early one morning before the prisoner had left his bed, a policeman having been at his side all night. But shortly after the arrival of the vessel in the Mersey, the policeman sitting at the side of the bed found that the prisoner had quite recently died. It appeared that without calling the attention of the policeman to what he was doing, he had managed to make a noose of the sleeve of his nightshirt, and had strangled himself without a struggle.

I have been fortunate in not having often been engaged in criminal cases, but I had a rather remarkable experience in a case of murder.

On a voyage to South America in a vessel carrying the English flag, the mate brutally murdered the captain. The mate, under an extradition treaty, was sent to this country in custody, and on arrival was committed for trial at the next assizes, and if tried and convicted would undoubtedly have been hanged. A client of mine, a merchant in good position in London, was the registered owner of the vessel, but it appeared that the vessel in fact belonged to a correspondent of his in Germany, and that at the request of that correspondent, who feared capture consequent on war or apprehended war between Germany and France, my client had allowed the vessel to be registered in his name as a British ship, and had for that purpose most unjustifiably made the requisite declaration in the nature of an oath at the London Custom House that no foreigner was interested as owner of the vessel. The registration was thus illegal; the vessel was not entitled to sail under the British flag, and was liable to be forfeited. The jurisdiction of the English Court to try the prisoner was, of course,

dependent on the offence having been committed on board an English ship. Thus the man who deserved to be hanged was about to be illegally sentenced to death, for, of course, the authorities had no reason to doubt the true nationality of the vessel. My client was in this awkward position. If he did nothing a man would be put to death without legal jurisdiction. On the other hand, if my client disclosed the true state of things he was liable to be prosecuted and imprisoned for having made a false declaration, and his correspondent's vessel, which was, I think, worth about thirty thousand pounds, was liable to be forfeited. I sent a case for opinion to Lord Justice Lush, then at the Bar, and Mr Justice Honyman, then also at the Bar, but they said it was not a case on which they cared to give an opinion, and said my client had better consult the parson of his parish. After consideration my client determined to run the risk of disclosing the true facts, and accordingly I sent a brief to counsel, with instructions to explain them to the judge. In the result, the prisoner,

who richly deserved punishment, was discharged, and no proceedings were taken either against my client or the vessel. It was doubtless thought he had done the right thing in preventing the man being tried by a Court which had no jurisdiction to try him.

The foregoing was the case of a guilty man who deserved punishment escaping it. There is every reason to believe that the converse cases in which innocent men are found guilty and punished are very rare, and that they are likely to be more so now that it is competent for the accused to give evidence. Somewhere about fifty years ago, the directors of a bank, known as the Royal British Bank, were tried in the Court of Queen's Bench, before Lord Campbell and a special jury. The case excited considerable interest at the time, and Lord Campbell, as usual, took the popular side, which was against the directors, and they were all convicted and imprisoned. There probably was no doubt as to the propriety of the result as respects some of the accused, but after the expiration of his

imprisonment I became professionally concerned for one of them, and it seemed to me quite clear that he would have been acquitted if he had been able to give evidence, but not being able to to do so, he was unable to show how materially his case differed from that of his co-directors, and he suffered for their misconduct.

It certainly seems extraordinary that until a comparatively recent period cases both criminal and civil were decided upon imperfect evidence as to the facts. Although in some few criminal trials this operated prejudicially to the accused, the practical evil was not so great as in civil actions. In those cases it was only by degrees that the evidence of any interested person was admissible, and it was not till some time afterwards that the parties were themselves competent to give evidence. Again, the discovery and production of documents, and the power to administer interrogatories to a litigant, followed at intervals. Indeed, it seems at one time to have been thought that private documents could justifiably be withheld. I was, many years ago, concerned

for the defendant in an action brought by the Admiralty against my client to recover damages in consequence of a steamship, of which he was the owner, having damaged the pier at Holyhead which the Government were erecting. The case came on for trial at Beaumaris Assizes. There had not been a special jury case there for ten years, and consequently the case excited much local interest; and there was a prejudice against my client, as the public in the locality were naturally interested in the Government works at Holyhead. A Government officer was called as a witness for the plaintiffs. I suggested to counsel for my client that the witness should be asked to produce his report to the Admiralty; but it was said that it was a private report, and that it was not the practice on the North Wales circuit to require the production of private documents. I demurred to this, and nothwithstanding the counsel on both sides were against me and referred to the above rule, I was somewhat persistent. Mr Justice Crompton, who was the judge, leaned over from the Bench, which was

immediately above the seats occupied by counsel, and asked what the discussion was about. When told, he at once said that the report must be produced. It proved to be fatal to the case of the plaintiffs, for it stated that the accident was entirely due to the works being insufficiently lighted, and consequently dangerous to navigation, and that such an accident was to be anticipated. In the result, notwithstanding local prejudice, my client obtained the verdict. Mr Welsby, a very eminent lawyer although not a Queen's Counsel, was the leading counsel for the plaintiffs, and was very indignant at the production of a private document being insisted on.

CHAPTER VIII

MENTION OF DISTINGUISHED JUDGES

In former days it was much more common than it is now for counsel, not having the rank of Queen's Counsel, to conduct important jury cases as well as to argue difficult questions of law. On the argument of special verdicts and demurrers only one counsel was heard, and it was the usage to brief junior counsel to argue, and in cases of importance, leading counsel, from the Attorney-General and Solicitor-General of the day downwards, had briefs to take notes. Their fees were almost nominal, but they attended the argument. The junior counsel who argued had of course a substantial fee. Mr Crompton and Mr Willes (both subsequently judges), Mr Welsby and Mr Cowling (none of whom were Queen's Counsel), were largely engaged in such

cases, as also was Mr Peacock, then a junior counsel, though he was afterwards made a Queen's Counsel. This did not formerly apply to the Court of Common Pleas, in which Court when sitting in Banc the serjeants alone had audience, but their exclusive right did not apply to trials by jury. The exclusive audience of the serjeants was abolished about the year 1846. The abolition of the privilege could not have been agreeable to those who had previously enjoyed it. Indeed, it was rather lamentable to see many serjeants sitting in Court day after day with their hands before them. Most of them were stout men, their robes differed from those of other barristers, and altogether their presence at times took up an inconvenient amount of room in a small Court. Not only had the serjeants the exclusive right of audience in Court, but they alone in the Common Pleas could sign pleadings or sign briefs for motions of course. These purely formal matters must in the aggregate have been very lucrative, although the fees were only half a guinea or one guinea in each case. Some of

the serjeants, however, had patents of precedents, and wore silk robes, and in several instances were eminent advocates. Mr Serjeant Wilde, who began his professional life as a solicitor in London, and afterwards became successively Attorney-General, Chief Justice of the Common Pleas, and as Lord Truro Lord Chancellor, was undoubtedly a great advocate. Indeed, I recollect Mr Baron Martin saying to counsel, who was quoting a case reported in Bingham's new cases: "I shall pay no attention to cases decided at that time. Sir Nicholas Tindal, who was an amiable man, was induced by Sir Thomas Wilde to decide cases as he wished."—The appointment of Sir Thomas Wilde to be Chief Justice gave rise to a curious discussion at the time. Sir Nicholas Tindal, the then Chief Justice, died on the morning of the day the then Government went out of office. There was a kind of tradition that the Attorney-General of the day had a claim to the Chief Justiceship of the Common Pleas. Sir Frederick Thesiger, afterwards Lord Chelmsford, was the Attorney-General in the

outgoing administration, and it was said that the vacancy having occurred when in fact he held that office, he had a claim to the Chief Justiceship. But this view did not prevail, and Sir Thomas Wilde was appointed. He was not only a very strong advocate, but remarkably painstaking. I remember a consultation with him at his chambers in Serjeants Inn, Fleet Street, at the time when consultations were usually held in the evening. The consultation referred to was very prolonged, and at twelve o'clock at night Sir Thomas Wilde suggested that an additional witness should be called. It was pointed out that the witness resided many miles from London, but Sir Thomas Wilde said there was just time, by going off at once, to get the witness in London by nine o'clock the next morning in time to give evidence in the case which was first in the list. My impression is that Lord Truro's career as Lord Chancellor was not generally deemed very successful. At all events, I recollect going to a consultation with Mr Bethell, afterwards Lord Westbury, on a part heard case before Lord Truro.

Mr Bethell came into the room, threw himself down in an arm-chair, and exclaimed: "This case will be the death of me. This case will be the death of me. If we had a man capable of understanding the most elementary questions of law or equity there might be some hope of seeing the end of it."

Baron Martin was a very popular but somewhat impetuous judge. I was concerned for the defendants in an action brought for breach of an agreement for sale to the plaintiff of certain mining rights. The case came on for trial at the assizes, and the facts not being in dispute, it was arranged that the question should be raised by way of a special case for the opinion of the Court as to the liability of the defendants to pay heavy damages claimed for loss, consequent on their inability to fulfil their contract. The special case came on for argument in the Court of Exchequer, when Baron Martin happened to be presiding. Although a good commercial and general lawyer, he had but little experience of real property law. Before the commencement of the argument the learned judge said to Mr

Quain, afterwards Mr Justice Quain, counsel for the plaintiffs: "Mr Quain, I have read this case. It appears a man has made a contract and broken it, and does not want to pay damages. Why should he not pay damages? What is the use of wasting the time of the Court in arguing such a question?" Mr Quain said: "That, my Lord, is exactly what I contend, but as my learned friends are here I should like, in anticipation of their views, to say a few words. They will probably rely on the case of *Flureau* v. *Thornhill*." Baron Martin: "What case? Did you say it was reported in Meeson and Welsby?" Mr Quain: "No, in William Blackstone." Baron Martin desired the usher to bring him the book, and, after looking at it for two or three minutes, said: "Mr Quain, I see the law was decided against you one hundred years ago, and I hope it will be the law for another hundred years; what is the use of occupying the time of the Court in arguing such a question?" All this took place within a very few minutes. However, the case (*Bain* v. *Fothergill*) was argued, and was ultimately decided by the

House of Lords in favour of my clients. On one occasion there was a somewhat painful scene in the Court of Exchequer. Baron Martin had married a daughter of Sir Frederick Pollock, the Chief Baron, and Sir Frederick Thesiger complained in Court that undue favouritism was shown by the Chief Baron to his son-in-law. I think there was a general feeling of surprise and regret that Sir Frederick Thesiger, who was a remarkably courteous man, should have made the remarks he did. I had many opportunities of forming an opinion, and I never saw the slightest ground for the suggestion. On one occasion, when a case was about to come on at the Guildhall before Chief Baron Pollock, my client came to me in a very excited state, saying he had just heard that the counsel opposed to us was the son-in-law of the judge, and that thus the case was hopeless; but I, of course, told my client there was no ground for his apprehensions.

The impetuosity of Baron Martin and his desire to get on with the business had drawbacks. On one occasion at Guildford Assizes I was engaged

for the plaintiffs in an action which was No. 3 in the list for the day. Baron Martin came into Court at a quarter before nine, and said: "Call the first case." He was reminded that nine o'clock was the hour at which the Court was appointed to sit, and that thus it would hardly do to call on any case before that hour. The learned judge then asked for the newspaper, and at five minutes to nine threw it down and directed the first case to be called, saying it was near enough to nine, and that the parties ought to be ready. The first case was called, but as no one answered, it was struck out. The same thing happened to the second case in the list. My case was then called on. We were ready, but my counsel explained that his learned friend Mr ——, who was on the other side, had gone up to town the previous evening, and was coming back by the train due at Guildford about half-past nine. Baron Martin, however, said we must either go on or withdraw the case. Consequently there was no alternative but to prove the case as undefended, and we readily obtained a verdict for a substantial sum, I think

about one thousand five hundred or one thousand six hundred pounds. But the defendant obtained an order for a new trial, and the consequence was that the case could not be again tried for several months. In the interval the defendant became bankrupt, and my client lost his money, which would have been paid had the trial proceeded in ordinary course, and my client obtained the verdict, which he doubtless would have done.

Sir John Jervis, Chief Justice of the Common Pleas, was a somewhat impetuous judge, but he was an exceptionally brilliant and able man, most remarkably quick. He had also the reputation of being a very sound lawyer. Mr Justice Willes, when at the Bar, more than once said to me: "How extraordinary it is that that man jumps as he does to a conclusion, and nearly always jumps right." He in fact virtually decided many cases on the opening of counsel. The great drawback to him as a judge was that he had obvious likes and dislikes, which he did not attempt to conceal, as respects certain members of the Bar. He seemed to delight in shutting some

men up. Personally, I have much reason to feel grateful to him, for, why I don't know, he was always particularly civil to me, and often in Court spoke kindly of and to me. In fact I believe that much of any professional success I have had may be attributed to the way in which, when I was quite a young man, he openly appealed to, or spoke of me in Court. He really knew nothing of me beyond his having on a few occasions when at the Bar held briefs for me. Sir John Jervis was a remarkably candid man. I recollect a case in which counsel moved for a new trial on the ground of misdirection, and read from the notes of the Chief Justices's summing up. He at once said: "That cannot be supported, there must be a new trial." The Court of Common Pleas, when presided over by Sir John Jervis, was a remarkably strong one, being ordinarily composed of the Chief Justice, Mr Justice Maule, Mr Justice Cresswell, and Mr Justice Vaughan Williams, all of whom were great lawyers and eminent judges. Probably there never has been a stronger Court.

The successor of Sir John Jervis as Chief Justice of the Common Pleas (Sir Alexander Cockburn) was a very different man, and was a very different judge when first appointed, to what he was in the latter part of his career as Lord Chief Justice of England. Previously to his appointment to the Common Pleas he had had little professional practice in mercantile or shipping cases, and the actions then tried in the Common Pleas were chiefly of that nature. The Chief Justice was very cautious and very slow, as compared with his predecessor, and frequently tried so to arrange that an action which might involve questions of mercantile law should be opened by counsel late in the day, obviously that he should have the opportunity of looking up the subject before the next morning, and more than once after the rising of the Court he has sent round to me at my office for copies of documents or for a book, in order that he might post himself up. This diffidence in after years completely left him, and he was disposed at times to be authoritative and impetuous, but I think he generally in the end calmed down.

I was engaged in an action brought against the late Sir Edward Watkin, in which it was sought to make him liable as a director of a company for statements in a prospectus. The suggested liability was of very serious amount. The case came on for trial before the Chief Justice and a special jury at Guildhall. Sir John Coleridge (afterwards Lord Coleridge), who was leading counsel for the plaintiff, at the commencement of the trial said it was too complicated a case to be tried by a jury, and urged me to agree to its being referred to an arbitrator, and said it was impossible to try it, as it would take twenty-one days, whereas the Court could only sit for fourteen days. I declined the suggestion of arbitration, and said if his client had brought an action which he could not try, it was not for me to help him. Sir John Coleridge accordingly opened the case in a way to emphasize its complication, and the difficulty of trying it in the ordinary way. On the second day of the trial there happened to be a dense London fog. The jury interposed, and said they were in a fog

about the case. The Chief Justice then said it must be referred, but inasmuch as I knew that there was no power compulsorily to refer it, I told counsel I declined on behalf of the defendant to discuss the suggestion. The Chief Justice was furious with me, and said he could only suppose that Sir Edward Watkin was advised to take advantage of the fog in the hope of defeating justice. However, I said nothing, and the trial went on for ten days. The jury then stopped the case and found a verdict for the defendant. The Chief Justice then said that some days previously he had made some strong remarks on the refusal of the defendant to consent to the case being referred to arbitration, but he thought it right to say that he considered Sir Edward Watkin was well advised in declining to arbitrate, and insisting on the matter being investigated in open Court.

I was concerned for the defendants in an action brought to recover a very large sum of money in respect of transactions in cotton in America. My client's correspondent in America

came over as a witness with all his books and papers, which were in perfect order. He was cross-examined at great length very severely, but my clients had the verdict. The agent from America went to the opera the night the trial was concluded, and there happened to meet the Chief Justice, who took him by both hands, and said he was delighted to have the opportunity of doing so. As may be supposed, the witness was highly pleased, and sought for a photograph of the Chief Justice to take back with him.

Although Sir Alexander Cockburn was not always a pleasant judge to practice before, he was a great improvement on his predecessor in the Queen's Bench, Lord Campbell, who was generally disagreeable to every one, and always took the popular side. I, on several occasions, availed myself of this. I usually brought actions in the Court of Common Pleas, but if I felt that there would be a certain amount of prejudice against the defendant, I issued the writ in the Queen's Bench, in order to take advantage of the probable leaning of Lord Campbell. Lord Campbell was, however,

undoubtedly a very able lawyer, and when sitting in Court with other judges there was, of course, little room for prejudice. I happened to be under examination before a Committee of the House of Lords on some question of proposed alteration of the law on the day the trial of Palmer, the notorious murderer, ended. Lord Campbell was a member of the Committee, and came to it direct from the Central Criminal Court, and announced that the prisoner had been found guilty. Some of the noble lords congratulated him on his having obtained the verdict. He said: "It is not a matter for congratulation, but it is very satisfactory."

For no judge of the past had I greater admiration than for Sir William Erle, the Chief Justice of the Common Pleas, who succeeded Sir Alexander Cockburn when the latter was promoted to the Queen's Bench. Sir William Erle was always courteous, but firm and very fair. He earnestly devoted himself to the case he was trying. There was no gossip or discussion of any kind, no time was wasted, and much business was got through.

It was my lot to be engaged in a great many cases tried before him at Guildhall, and never were cases better tried. He knew when and how to make up his mind. I recollect his saying: "There is a time for the mind to remain in doubt, but when once you have made up your mind no power this side of the grave should induce you to alter it."

On another occasion he said to Sir George Honyman, who was moving on the ground of misdirection: "No doubt you think I was wrong, and perhaps you are right, but it is one of those things I shall have to answer for at the last Judgment, and I am afraid I must refer you to that Tribunal." After he retired from the Bench, Sir William Erle was a member of the Judicature Commission. At a meeting of that body I ventured to suggest a resolution in favour of what is now known as Order 14, which was in fact merely an extension of Mr Justice Keating's Act, which applied only to Bills of Exchange. Sir William Erle said he generally agreed with me, but must oppose my suggestion, and urged that it would be an instrument of oppression. The subject was discussed

at intervals on several occasions, and it is hardly necessary to say the suggestion was ultimately adopted, but it was always opposed by Sir William Erle. Few, if any, will deny that it has been beneficial, although it has in practice been more comprehensive than was originally contemplated. It was not intended that it should give rise to a preliminiary decision on affidavits as to the merits, but should only be resorted to when there was no plausible ground of defence, and it was manifest that the object of the defendant was to gain time.

I do not think Sir William Bovill, who succeeded Sir William Erle as Chief Justice of the Common Pleas, can be considered as having been a satisfactory judge. He not only perpetually interrupted and put forward views of his own as to the facts which were often wholly unfounded, but he frequently in Court imputed unfair conduct on the part of counsel or solicitors. I knew him well privately, and he was always very friendly out of Court, but in Court he seemed to think he was not fairly treated, and was being misled. I

was in Court during several very deplorable scenes. In one case in which I was concerned for the plaintiff, Mr Edward James, Q.C., the then leader of the Northern Circuit and a most able advocate, was counsel for the defendant. The trial had commenced at the sitting of the Court on the Monday, and the plaintiff's case was not concluded until the following afternoon. Mr Edward James began his speech to the jury by saying he greatly regretted that so much of their time should have been occupied with what seemed to him a case free from intricacy or complication, and said he thought the jury would acquit him, and he might also say acquit his learned friend Sir George Honyman, who was counsel for the plaintiff, of having wasted their time. He said that as the jury were aware, it was the province and duty of counsel not wholly without remuneration, before a case came into Court, to study it with the view of presenting the material facts to the jury. His lordship, who filled an office for which he had the highest respect, who could have known nothing whatever of the case before it came into Court,

had deemed himself far more competent to deal with the case than either his learned friend or himself, and thus there had been great waste of time, to the inconvenience of the jury and the prejudice of all interested.

Several similar scenes occurred between the Chief Justice and Mr Edward James. I may add that in the very first case the former tried at the Guildhall, I had to move the Court on affidavits, in consequence of his having refused to allow a witness to be recalled in order to give explanations rendered necessary by evidence given on behalf of the defendant.

My only experience of electioneering was in connection with Sir William Bovill. Before he became a Queen's Counsel he was desirous of getting into Parliament. He happened to be junior counsel for me at the Guildhall when news arrived that Mr George Turner (afterwards Lord Justice Turner), the then member for Coventry, had been appointed Vice-Chancellor. I somewhat jokingly suggested to Mr Bovill that he should stand. He said he knew no one there, but I

offered him an introduction to the leader of the party at Coventry. Mr Bovill said he would go down if I would go with him, and a telegram was accordingly sent saying we were coming. On arrival we found a small committee assembled, and discussion ensued, in the course of which it was stated that a number of voters (I think about three hundred) resided two or three miles from Coventry, that it was necessary to pay them a pound a-piece, and that Mr George Turner and all other candidates had always done so. At that time bribery had somewhat ceased to be considered so harmless as it had previously been, and Mr Bovill and I naturally felt doubts as to the safety of making the suggested payments. In the result we beat a retreat to Rugby, and telegraphed to Mr Henry Merewether, Q.C., who had extensive experience in election cases, to come down, which he did; and in the result Mr Bovill telegraphed that he would not stand, and we returned to London in the morning. The remarkable thing is that Lord Justice Turner, who was in every relation of life a most exemplary

man, and a very eminent lawyer, should have thought there was no objection to these payments. Nothing can more strongly show the change in public opinion.

There has also been a great change in the view which has been taken of smuggling. I recollect the time when ladies who had been to Paris, boasted, on their return, of the gloves and lace they had brought back in their pockets, as well as of silk or velvet dresses they or their servants had concealed in their luggage. Indeed, a well-known Vice-Chancellor once told me at Homburg, that he always brought his own cigars with him, and said that he had a contrivance by which the cigars were concealed in his boots, so as to avoid payment of duty. It did not seem to have occurred to him that sitting in his own Court he would have had to condemn any device for the avoidance of a legal obligation.

I may refer to a prominent English judge who took another view. He called on me in the city, and said he found he had paid less income-tax

than was legally due, but did not like to formally admit it, and still less to be charged with the omission. He brought a cheque for three hundred pounds, which he said he thought would fully cover any amount claimable, and asked me to pay it to my bankers, and subsequently to send bank-notes (having taken the numbers) by a clerk, in an envelope, in the evening, to the treasury, accompanied by an anonymous note requesting an acknowledgment in *The Times*. This was done, and nothing further was heard of the matter.

My experience shows that the income-tax is very unequally borne. Many, no doubt, pay with strict accuracy, but I could refer to many cases in which the reverse, to a very considerable amount, has been the case. Some time back a client of mine called on me with a letter he had written, and proposed to send to the treasury, enclosing a cheque for two thousand pounds on account of income-tax underpaid. I told him that if he sent the letter he would receive no thanks, and would probably have a great deal of

trouble, whereas if he did nothing, no question was likely to be raised. In the result, before leaving the room, he put the letter and the cheque in the fire.

CHAPTER IX

DIFFERENCE OF OPINION OF EMINENT JUDGES AS TO JUDGMENT TO BE GIVEN

A JUDGE for whom I had the greatest admiration and regard was Lord Bramwell. I had known him when he was a junior barrister, and saw a great deal of him for many years up to the time of his death. In fact I, for some time, saw him nearly every Sunday afternoon when he was in town. He was by some misunderstood, and was thought to be a rather hard judge; but in fact he had a remarkably soft heart and was easily moved to tears. He was counsel for the defendant in a case of *Lumley* v. *Gye*, which created considerable interest at the time in theatrical circles. The case was tried before Lord Campbell at the Guildhall, and Lord Campbell summed up very strongly in favour of the plaintiff. The jury retired to consider

their verdict. I had nothing to do with that case, but Lord Bramwell was counsel for me in the next case, which was an action on a Charter party, or something of the kind, and of no public interest. During the trial of that case, the jury in *Lumley* v. *Gye* came into Court, and to the surprise of every one, returned a verdict for the defendant. Lord Bramwell, then of course Mr Bramwell, burst into tears and cried like a child. He said to me: "You must think me very weak, but I could not bear to see that young man ruined by that old brute," meaning Lord Campbell, for whom he had a strong aversion. I recollect Lord Bramwell when at the Bar arguing a case in the Court of Common Pleas at Westminster, being asked by one of the judges: "Where do you draw the line, Mr Bramwell?" He replied: "I don't know, and I don't care, my Lord. It is enough for me that my client is on the right side of it." On another occasion, when he was arguing a case in the Exchequer Chamber, and had been much interrupted by the judges (of which when at the Bar he always complained),

Chief Justice Jervis, who was presiding when the usual time for adjournment arrived, asked him if he could conclude his arguments that day. He replied it depended on whether he was interrupted or not. The Chief Justice said it must be adjourned, and Mr Bramwell said that he hoped to finish in about an hour the next morning. The Chief Justice, as he was leaving the Court, said: "Mr Bramwell, you will not be interrupted to-morrow, as the judges will not be here." Mr Bramwell had not recognised that the sittings terminated that day.

A member of the Common Law Bar, Mr A., once told me a characteristic story of Lord Bramwell. Mr A., who did not previously know him, was staying weather-bound at a small hotel on the Continent, at which Lord Bramwell was, from the like cause, detained. As often happens under such circumstances, they became rather intimate, and when the time arrived for their departure on different ways, Lord Bramwell expressed the hope that he should meet Mr A. the next term. Mr A. said unfortunately he had not much Court work,

and that Lord Bramwell would have forgotten him. Lord Bramwell ridiculed that suggestion, but at Mr A.'s suggestion a watchword was agreed on, so that Lord Bramwell might, in case of need, be reminded. It was "Waddy waddy," or some such unmeaning phrase. Mr A. said he had nothing to do in the Court of Exchequer for sometime afterwards, but at length he had to make an unimportant motion in the Court, and found Baron Bramwell presiding. Mr A. said he was rather nervous, and in ordinary course said: "I have to apply——" Before he got further, Baron Bramwell interposed: "Apply for what, sir?" Mr A.: "My lord, I hoped——" Baron Bramwell: "Hoped what, sir?" Mr A.: "Your lordship might remember——" Baron Bramwell: "Remember what, sir?" Mr A.: "Waddy waddy!" Baron Bramwell — after a momentary pause—"Mr A., I humbly beg your pardon."

Lord Bramwell, like Baron Martin, disliked display or ostentation of any kind, and did not appreciate the pomp of circuit. He was passionately fond of music, and liked controversy. He

frequently wrote letters to the *Times*, which were generally signed "B." He strongly protested against the extreme temperance views, and used to say there were two kinds of intemperance, also that he protested against beer being called an intoxicating beverage—that water might as well be called a drowning beverage. But as he often said, his real interest was in law. He regarded it as a science apart from any professional interest. Many years before he was a judge, I had sent him a case for his opinion. He said to me some time after he had had the case: "You must think I take a long time sending you that opinion. The fact is, I have written two opinions, one in your favour and the other against you. I read them both every morning, and cannot make up my mind which to send you." I expressed regret that it gave him so much trouble; he replied that it was a real pleasure to him. He took a strong view in favour of the plaintiff in the case of *Vagliano* v. *The Bank of England*, an action which excited considerable interest amongst bankers and others, and especially interesting to Lord Bramwell, not

only with reference to the question of law which it raised, but also because he had practical experience of London banking business. He differed from the majority in the House of Lords, and in giving his judgment said: "If your lordships affirm the decision of the Court of Appeal, your lordships will be establishing an intelligible principle of law. If, on the other hand, as I fear may be the case, you decide in favour of the appellant, the only possible head-note to the report of the case will be 'judgment reversed.'" *Vagliano* v. *The Bank of England* is one of several cases in which I have been concerned in which there has not only been a remarkable difference of judicial opinion, but in which the number of judges in favour of the successful party has been less than the number in favour of the unsuccessful party. *Vagliano* v. *The Bank of England* was, out of the usual course, argued before the six judges of the Court of Appeal, and five of those judges were in favour of the plaintiff, and agreed with Mr Justice Charles, who tried the case. But in the House of Lords six of the noble lords were in favour of the

defendants and two in favour of the plaintiff. Thus, in the result, the views of seven judges prevailed over those of eight judges, who were in favour of the plaintiff. In a case of *Mollett* v. *Robinson*, in which I was also concerned, the difference was more remarkable. The Chief Justice who tried the case was in favour of the plaintiff. On an application for a new trial argued before four judges, they were equally divided—two being of opinion that the plaintiff should succeed, and two being of the contrary opinion. On appeal to the Exchequer Chamber, heard before six judges, those judges were again equally divided. Finally, on appeal to the House of Lords, the defendant had a majority.

The case of *Bullen* v. *Sharp* was also remarkable in this respect, four judges, constituting the full Court of Common Pleas, unanimously decided in favour of the plaintiff, but on appeal to the Exchequer Chamber the case was argued before six judges—two of whom agreed with the Court of Common Pleas, but four were in favour of the defendant, who thus succeeded. My opponents

appealed to the House of Lords, but did not prosecute the appeal, although a large amount was involved.

The recent case of *The New River Company* v. *The Metropolitan Water Board*, which was of great pecuniary importance, affords another instance of remarkable difference of opinion. The Lord Chancellor, the Master of the Rolls, Lord Justice Romer and Lord Justice Mathew, were in favour of the company, but Lords Macnaghton, Lindley, and James of Hereford, were in favour of the Water Board, and their view prevailed.

These instances of the difference of views entertained by eminent and great lawyers seem strongly to emphasize the uncertainty of litigation.

It is to be borne in mind that, in the great majority of law suits, there is a *bonâ fide* difference in the views of the advisers of the respective litigants, and the result often in great measure depends on who may happen to be the judges sitting on a particular day. On some questions the view likely to be taken by a judge is known to those who are in the habit of practising before him.

The late Lord Selborne once told me that when he was practising at the Rolls Court, he should, if he had been asked (which he was not), have advised an appeal in eight out of every ten cases decided in that Court; Lord Selborne added that he did not say the decisions were wrong, but he thought there would be reasonable probability of appeals being successful. Lord Justice James once said to me that in every honest appeal the presumption was in favour of the appellant. It may be doubted, however, whether that eminent judge, if now living, would be of the same opinion.

The dislike in the present day which some judges show to having their decisions reversed, did not, I think, formerly exist, at all events, in the Common Law Courts. This probably can be accounted for by reason of the status of the judges in the other Courts being the same, and, consequently, when the Exchequer Chamber, which was composed of the judges of two of the Courts of Common Law, overruled the judges of the other Court, it was considered by the judges whose

decision was reversed much in the same light as if, when they were at the Bar, another equally eminent man had given a different opinion on a case submitted to him. I remember walking away from Westminster Hall with Lord Bramwell and Mr Justice Honyman, the latter having just delivered in the Exchequer Chamber judgment in favour of my clients reversing a decision of the Court of Exchequer, to which Lord Bramwell was a party. Lord Bramwell chaffed Mr Justice Honyman, and spoke of the impertinence of a boy upsetting the judgment of his seniors. Mr Justice Honyman had then very recently been appointed a judge, but he had a deservedly great reputation as a lawyer, and was especially conversant with marine insurance law, and on that ground was, doubtless, deputed by the other judges to deliver the judgment of the Court.

If by a system of appeals to the highest authority the principles of law could be finally and clearly defined for the guidance of future generations it would, doubtless, be an advantage, although it might seem hard that the suitors should

have to bear the brunt of the formation of a code; but judging from past experience no such result seems likely to be obtained. Year by year the number of reported cases, each supposed to be an authority on some proposition of law and to be distinguished from some preceding case, increases; and it is an alarming prospect for future practitioners to contemplate the mass of books and authorities, to which in order to conform to the system of quoting every decision in any way bearing on the particular case it will be necessary to refer. At all events, the suitors take no interest in law as a science. They merely desire to have a decision in the case in which they are interested. They are not concerned with what has happened or may happen in any other matter. I believe the majority of suitors would prefer a system without appeal. In commercial cases, at all events, a prompt and final decision is desired, and one which can be obtained without the risk of having to pay costs wholly out of proportion to the amount involved in the particular case. But, as I have said, the modern practice

giving a practically undisputed right of appeal, involving three hearings with the possibility of having to pay the costs of each hearing, introduces the gambling element, and debars prudent men from embarking in litigation.

The old system, although in many respects indefensible, was in the Common Law Courts preferable in practice. The appeal by way of Bill of Exceptions was cumbrous and very unsatisfactory, but it had the effect to which Lord Blackburn, as I have said, referred, of preventing the judge from being a despot; and it was not often resorted to, inasmuch as if the appellant succeeded he had to pay his own costs of the appeal, and if he failed he had also to pay his opponent's costs. I do not believe there is any foundation for the suggestion which is sometimes made that the increase in the number of appeals arises from lessened confidence in the judges of the present day. On the contrary, I believe there would have been the same disposition to appeal from decisions of eminent judges in the past, if appeals had then been possible on the now existing lines.

CHAPTER X

PROMOTION TO THE BENCH—ABILITY AND TACT OF ADVOCATES

It is, no doubt, of the utmost importance to the suitors and the public that full confidence should be felt in the ability of the judges. So long as I can remember, there has occasionally, but not I think very often, been a feeling of dissatisfaction with a particular appointment, but it seems obvious that the selection must at times be a matter of considerable difficulty. If the experience of the Lord Chancellor of the day has been chiefly in Chancery business he probably knows little of the counsel, however eminent, practising at the Common Law Bar. If, on the other hand, the Lord Chancellor practised at the Common Law Bar, he probably would have only slight knowledge of the

qualifications of counsel at the Equity Bar. Probably this was more so formerly than it is now, inasmuch as occasionally equity cases now arise for decision in the Common Law Courts, and questions of Common Law have to be decided in the Chancery Division. Formerly, if the question was one in which the remedy was in equity the action failed if brought in a Court of Common Law, and in like manner, if the plaintiff had a remedy at Common Law, and brought his suit in Chancery, it was dismissed. I was concerned in a case in relation to marine insurance, in which my clients succeeded before the Vice-Chancellor in recovering heavy damages, but on Appeal the Lords Justices, without going into the merits of the case, held that the plaintiffs remedy was at law, and dismissed the suit, leaving the plaintiff to begin *de novo* in a Court of Common Law. But reverting to the difficulty there may occasionally be in the selection of a suitable member of the Bar to fill a vacant judgeship, I will mention the case of the late Mr Justice Grove who was appointed by Lord Hatherley;

so far as I know, no exception was or could be made to the appointment, and certainly it proved to be a satisfactory one. But a day or two after the appointment had been publicly announced, Lord Hatherley asked me what was thought of it, and said he was puzzled about it, inasmuch as he knew very little of counsel at the Common Law Bar, but said that Mr Grove had argued some patent cases before him, and thus he had more knowledge of him than of most others. Lord Hatherley added: "You will doubtless think that I could readily obtain information and advice, but it would be dangerous, for I should be recommended to make an appointment which the person suggesting it would not have taken the responsibility of making himself." On another occasion I happened to see Lord Hatherley shortly after he had appointed a Lord Justice at a time when there were only two Lords Justices. Lord Hatherley again asked if the appointment gave satisfaction in the profession. I ventured to say I believed it had been hoped that Mr Mellish would have been appointed.

Lord Hatherley said he had thought of appointing him, but did not do so as he had such a bad temper. I said that I thought this was a complete misapprehension. I had seen a good deal of Mr Mellish, and thought him a man with a really sweet disposition, and I believed Lord Hatherley had been misled by having seen Mr Mellish when in Court writhing with pain resulting from the acute gouty rheumatism from which he suffered. I need hardly say that Mr Mellish was subsequently appointed a Lord Justice. Every one with experience in the Common Law Courts knew that he was pre-eminently qualified for the position, and was sure to prove a very eminent judge.

There has, I believe, been some diversity as to the course adopted by counsel with respect to pending cases on receiving notice of their appointment to the Bench, but before they were sworn in. When Mr Justice Willes was appointed he was junior counsel in a case in the Court of Common Pleas in the Guildhall, which was not finished at the rising of the Court.

Mr Montagu Chambers was the leading counsel, and it was arranged that there should be a consultation that evening. When I went to the consultation I found Mr Willes walking up and down the small Court in which the former had his chambers. He said he was waiting for me to tell me that he had been appointed, but desired me not to mention it at the consultation. Mr Chambers apparently had not heard of it, and I walked away with Mr Justice Willes, who said he should be in Court as usual the next morning. However, on the following morning my clerk came to me, saying Mr Willes wished to speak to me, and was waiting in the small back passage behind the Court. On my going to him he said he had seen Lord Campbell, who said it would be most improper for him to appear in Court, and that he ought on no account to do so. On the day the appointment of Mr Justice Shee was announced in *The Times* he happened to be counsel for the plaintiff in an action which stood first in the list at Guildhall, and he jokingly asked me to let him have the verdict in

that his last case. He conducted the trial in the usual way, but did not get the verdict. When Mr Justice Quain was appointed he was counsel for me in a case then on at Liverpool. He finished the case, and asked to be allowed to keep the brief as a memento of his last case. I could refer to other instances. As to fees paid to counsel with briefs on which they were unable to appear, consequent on their having been appointed judges, the practice has not been uniform, some eminent judges maintaining that it was not the usage to return fees under such circumstances. I think the first intimation I had of the appointment of Lord Selborne as Lord Chancellor was the receipt of a cheque for the fees which had been paid on a brief in the House of Lords. The circumstances of that case might well have been thought to justify a different course. The papers were rather heavy and the question was a difficult one. The appeal had been in the paper for hearing on two days before the vacation, and Lord Selborne had been in attendance on both days at the

House of Lords, ready to argue, and there had been at least one consultation, but the case was not reached before the vacation, in the course of which he became Lord Chancellor. Thus he had had much trouble with the case, but he returned the whole of the fees.

Although it has, so long as my memory extends, been by no means uncommon to criticise the conduct of a judge in a particular case, and to complain of the course he has adopted, no human being has ever suggested want of uprightness. Unfairness merely means endeavouring to secure the result he deems right, and striving to prevent the success of the contrary view. It has been my lot on many occasions to bring actions for foreigners not resident in this country, and more than once I have been asked before the trial whether it would not be proper to send a present to the judge. There seems reason to fear that this absolute uprightness of the judges is not universal in all countries, but probably there has been an improvement in this respect. Some years ago I was engaged on behalf of a

firm in this country in a law suit brought by them in America, which was conducted by my correspondents there. One day I had a visit at my office in London, the visitor saying, on entering my room, that although I did not know him I should understand who he was when he said he was engaged for the defendants in America in the action to which I have referred. He added that he had thought it well to take a trip over in order to have a chat about the case. He said: "You seem a sensible kind of man, and you will understand that I do not come to endeavour to convince you that you have got no case, but I wish to suggest to you that there is a large sum at stake, and that when that is the case it is not always the right side succeeds. You are a sensible kind of man, and you will know what I mean. I daresay it will occur to you that it is a game at which two can play, but allow me to give a bit of advice. It is a dangerous game to play, and if you try your hand at it you will probably make a mess of it. These are matters it is difficult to explain in a letter, and therefore

I thought it as well to come over and have a chat." I believe all this was really to hide his true object in coming, which, doubtless, was to effect a compromise of the case, which he succeeded in doing. I am bound to say that, having been concerned in a considerable amount of litigation in America, I have never had the slightest reason to suspect any underhand proceedings. Nor have I any reason to doubt that the legal practitioners in America are as a rule equally to be trusted as those of repute in this country, many of whom are undoubtedly men of very great ability and entitled to the fullest confidence. But in America, as elsewhere, there may be differences with respect to the conduct of an individual practitioner. Some years ago the agent in New York of clients of mine in London died, having in his possession property of great value belonging to his principals, my clients in London. They through their bankers sent out a power of attorney in blank with a request to the bankers in New York to insert the name of an energetic lawyer and to hand the papers to him with

instructions to take prompt action for the purpose of obtaining the securities which were in the hands of the deceased agent. The conduct of the lawyer to whom the bank handed the papers was complained of, and he, in apparent triumphant explanation of what he had done, and the groundlessness of the complaint against him, printed and circulated a pamphlet. In this he said that on a certain day he received from the bankers in New York a power of attorney enabling him to act on behalf of a firm in London who were previously strangers to him, and that on receipt of this power of attorney he wrote to the widow of the deceased agent to the following effect:

"Dear Mrs ——, I have just received a power of attorney from a firm in London instructing me on their behalf to take very serious proceedings against you. Now if you will send me a retaining fee of ten thousand dollars (and I won't take one cent less) I will return the papers to London and say I am engaged to act for you."

It is right to add that this explanation was not, I believe, deemed satisfactory by his fellow-practitioners in New York.

The abhorrence in this country of anything approaching disloyalty or treachery on the part of legal practitioners or their clerks is certainly remarkable. Unhappily it cannot be said that they are without exception free from misconduct or crime of various kinds, but it is rare indeed for complaint to be made of illicit information having been given to an opponent—although the temptation to give it may at times be strong. Sir George Honyman, when at the Bar, was arbitrator in a case of no importance in itself, and in the ordinary course issued the usual notice that his award was ready to be delivered against payment of the fees. The plaintiff in the action was impecunious, and the defendant, who was not so, had no motive for taking up the award as it could not pecuniarily benefit him. Thus nothing was done, but after a time Sir George Honyman's clerk received a note from the attorney of the plaintiff in the action asking him to meet him at eight o'clock in the evening in Leicester Square. Sir George Honyman's clerk, who was a most reliable man, went to Leicester Square at the time appointed,

and there met the plaintiff's attorney, who said he was sorry to trouble him but he had a five pound note for him, and merely wished to be told in whose favour the award was. Sir George Honyman was in the habit of saying that his foolish clerk declined to give the desired information, whereas if he had said that the award was in the plaintiff's favour Sir George Honyman would have received his fees, his clerk would have got five pounds, and the rascal would have been sold!

Sir George Honyman was one of the ablest and most accurate men I have known at the Bar. He had an extraordinary memory. I have known him when a case in which he was not engaged was being argued, say to counsel engaged that a similar point arose in the case of So-and-so, reported in such and such a volume of some old reports, and adding the page at which he thought it was. Sir George Honyman was in failing health when appointed a judge, and died not long afterwards, or he would probably have had a high reputation as a judge.

Most solicitors having experience in contentious litigation realise the importance of engaging counsel whose qualifications are adapted to the particular case, but occasionally an inexperienced practitioner makes a mistake in this respect. I remember seeing a highly-respected and well-known Lincoln's Inn solicitor at the Guildhall who told me he was acting for the defendant in an action for breach of promise of marriage; that, as there was no defence, and it was a mere question of damages, he had only briefed one counsel, and as he understood Mr Willes was an eminent member of the Common Law Bar, he had delivered a brief to him with instructions to cross-examine the plaintiff and throw ridicule on the case. It would probably have been difficult to have instructed a member of the Bar less fitted, notwithstanding his great abilities, to do so. Mr Justice Willes during a great part of his career at the Bar, and before his marriage, lived in chambers in the Temple. If he was not engaged in Court he stayed in bed during the day and settled pleadings and wrote opinions there. I recollect sending a

clerk with instructions to Mr Willes to attend a summons before a judge in chambers. My clerk said he found Mr Willes in bed and explained the case to him, when he said he would get up and go to the judge's chambers, which he did. When at the Bar Mr Justice Willes had not, I think, much sympathy with leading *nisi prius* advocates. I attended a consultation in a case of much difficulty and importance with Sir Fitzroy Kelly and other eminent counsel. Mr Justice Willes, who was the junior counsel, had written an elaborate opinion on the case. During the consultation Sir Fitzroy Kelly asked him his views, and requested him to say something, but he merely replied: "What I have written I have written!!"

The sad death of Mr Justice Willes in the year 1872 greatly distressed all who knew him, but it had been noticed that for some time previously his health was failing. In the year 1871 an Act of Parliament was passed authorising the appointment of two paid members of the Judicial Committee of the Privy Council, and

providing that judges of the Courts should alone be eligible for the appointment. I happened to be engaged at Guildhall in a case tried before Mr Justice Willes in which the jury retired to consider their verdict. The learned judge beckoned me into his private room, and, after saying he must shut the door or his clerk would be listening, told me he had reason to believe that he might if he liked be appointed to the Privy Council, and wished to know whether I thought he should accept it. I unhesitatingly said I thought it was precisely what would suit him—the questions to be decided would interest him. There would be much less work and the salary would be the same. He said the objection he had was that there was no provision for his clerk as he thought there ought to be. I suggested that this if deemed necessary might be arranged, inasmuch as the salary was the same, and he would be saved circuit expenses, which were then borne by the judges, and thus he could if he thought fit put this right; but he said that he did not consider that would be the right thing, and that unless

the authorities would provide for a clerk he was not disposed to agree. Thus this eminent judge probably sacrificed himself rather than prejudice his clerk, to whom he was under no special obligations. I well recollect the time when the late Sir William Harcourt was a pupil of Mr Justice Willes and usually sat in his room. Sir William Harcourt shortly before his death told me that few persons had known him so long as I had. When Mr Justice Willes was made a judge he suggested to many of his clients that they should send papers to Mr Vernon Harcourt. In consequence, he was at that time constantly referred to as "The Codicil." But Mr Harcourt was never prominent in the Law Courts, and after he took silk in 1866 his practice was practically confined to Parliamentary Committees, except for the few months he was Solicitor-General at the end of 1873 and beginning of 1874.

Lord Blackburn, although a great lawyer, was never a Queen's Counsel, and had not the qualifications for a successful *nisi prius* advocate. I may refer to a remarkable instance of this. I

was engaged in the trial at Guildhall of a case of *Sweeting* v. *Pearce*. It was an action brought by a shipowner against underwriters on a policy on a ship which was lost. The right of the plaintiff to be paid was not disputed, but it was contended by the underwriters that they had settled the loss in account with the insurance brokers (who had become bankrupt), and that thus the remedy on the policy was gone. It had in several previous cases been held by the Courts that the custom for underwriters to settle losses in account with the brokers was so general that London shipowners and London merchants must be presumed to know it, and thus be bound by it, but that as against country shipowners and merchants there was no such presumption. Shortly before the case of *Sweeting* v. *Pearce* arose the Act of Parliament was passed which enabled litigants to give evidence, and accordingly it was proposed to call the plaintiff as a witness to say that he was ignorant of the custom, and thus to rebut the presumption which had prevailed in previous cases. The loss under the policy not

being in dispute, it was for the underwriters to establish their defence, based on the plaintiff being bound by the settlement with the bankrupt insurance brokers, and thus it was for the defendants to begin at the trial. When the case was called on before a special jury Mr Wilde, Q.C. (afterwards Lord Penzance), and Mr Bovill, Q.C. (afterwards Chief Justice) were speaking in other Courts, and thus Mr Blackburn as junior counsel with them had to make the opening speech to the jury. He in doing so commenced by saying that he deeply regretted the absence of his learned friends, as the case was one of great importance, and involved the explanation of a peculiar custom of which probably none of them had ever heard. I at once turned to Mr Montagu Smith, Q.C. (afterwards Mr Justice Montagu Smith), who was leading counsel for the plaintiff and said: "That gives us the verdict." It will be borne in mind that the case of the underwriters was, that the custom was so natural and so well known that the plaintiff was not to be believed when he said he did not know it, and yet Mr

Blackburn injudiciously said at the commencement to a London special jury that probably they had never heard of such a custom. In the result the underwriters lost the case, and thenceforth the presumption of knowledge on the part of London shipowners came to an end, and the old system at Lloyds was in a great measure discontinued.

The foregoing was an instance of want of tact on the part of a very eminent man, and was not the result of want of confidence in the justice of his client's case; but formerly, when technicalities and the strict application of stringent rules of law were favoured, the real merits of the case did not always prevail. I remember Mr Ogle, who had considerable practice in the Common Law Courts as a junior barrister, when arguing a case in the Court of Common Pleas, being told by the Chief Justice (Sir John Jervis) that his argument was opposed to the manifest honesty and justice of the case. Mr Ogle replied: "I know it, my lord. I prefer arguing against the honesty and justice of a case." Probably few,

if any, barristers would now make such a statement in open Court, but, of course, success under such circumstances might, when law was considered very much as a mere science, be treated as testimony to the ability of the advocate.

I might refer, on the other hand, to instances of real tact on the part of the advocate. One very remarkable instance was displayed by Vice-Chancellor Bacon when a leader at the Bar. I sent him a case to advise on a question which arose in bankruptcy as between joint and separate estates, and which involved a very large sum of money. I had a conference with Mr Bacon on the questions submitted to him, at which he expressed an opinion adverse to my client. Having done so, he said: "I have given my opinion on the questions you put to me. Now I am going to give you an opinion for which you have not asked. I advise you not to act on the opinion I have given. The obvious justice of the case is on your clients' side and law is uncertain." Accordingly I instituted proceedings, and the case came before Lord Justice

Knight Bruce (then Vice - Chancellor) for argument. Mr Bacon in opening it cautiously slurred over the difficulty (based on some technical rule) which he had advised was fatal, and dwelt on the injustice which an adverse decision would involve. Mr James Russell, Q.C., who was on the other side, and who was an eminent authority on bankruptcy law, dwelt at great length on the point which Mr Bacon had glossed over. The case lasted three days, and on the third day when Mr Bacon replied, he said, that his learned friend had deemed it right to occupy a great deal of His Honour's time in endeavouring to defeat the case on technicality contrary to the merits, and added that, in opening the case he had in anticipation suggested an answer to the view on which his learned friend relied, and that as he knew the learned judge never forgot what he had once heard he should not say another word on the subject. Lord Justice Knight Bruce, who was a very conceited, as well as a very able, judge, had evidently forgotten what Mr Bacon referred to, but was not disposed to admit it; and without

in his judgment alluding to the difficulty, gave judgment in my client's favour, pointing out the injustice which a contrary decision would involve. Although pressed to allow an appeal he declined to do so, stating that he had decided solely on the facts. At that time there was no appeal on questions of fact except by leave.

I had the privilege of knowing Vice-Chancellor Bacon from the time he was a member of the junior Bar. Shortly before he resigned I met him at a dinner at a friend's house and said I was glad to see him so well notwithstanding his hard work. He replied: "Hard work is a good thing. It keeps a man out of mischief. It has not hurt me, and it has not hurt you." I recall a remarkable consultation when Mr Bacon was junior counsel with Sir Charles Wetherall at the chambers in Stone Buildings, where he resided. It was on an application to commit to prison for contempt the Directors of a Gas Company on the ground that the Company had continued to lay certain mains after notice of an injunction to restrain them. The Directors were gentlemen

of position, and one was the representative in Parliament of the locality. They were naturally anxious, for the application was not obviously groundless, and some of them went to the consultation on the morning of the day the case was to come on. On knocking at the door it was opened by Sir Charles Wetherall, with nothing on but his night shirt, which doubtless had been white, but could hardly at that time be so described. Having asked us in, he proceeded to dress and to shave in the calmest way without a word of explanation or apology. In Court before Lord Lyndhurst he ridiculed the case, and the application was not successful. He was a remarkable man. He did not wear braces, and there was generally a space of an inch or so between his waistcoat and the top of his trousers.

I was engaged in a somewhat remarkable case before Vice-Chancellor Bacon. A lady occupying a good position in Society, and of striking personality, claimed a considerable sum of money—some £13,000 or £14,000—from the estate of a gentleman who had died some years

previously, and was a man of wealth carrying on extensive business as a foreign banker in London. The case of the lady was that before her marriage, when she was very young, she had given the deceased gentleman large sums in gold and bank notes to invest for her; that she had afterwards married an officer in the army and had gone to India with him; that on her return to this country, after the lapse of many years, she applied for the money and interest on it, and then heard of the death of the banker. She had made no previous application for either principal or interest. She could not satisfactorily explain how she became possessed of the money which was alleged to have been deposited. Her father, although in a good social position, had only a moderate income, chiefly dependent on his life, and had other children. However, the lady persisted in her claim, and was cross-examined at great length for two days by Mr Charles Russell, Q.C., afterwards Lord Russell of Killowen, and Lord Chief Justice. During the cross-examination Mr Russell received an anonymous

letter stating that, if he continued to cross-examine the lady in such an offensive way, his chance of promotion would be gone as she was a friend of Lord Cairns. As may be supposed, this letter did not have the desired effect; indeed, such a letter could not have been addressed to any one less likely to be influenced by it; and on the sitting of the Court on the third day it was stated that the lady was not well enough to attend the Court. Her solicitor afterwards asked me if my client would not give her something to abandon the claim. I replied only board and lodging free for a considerable period. Nothing further was heard of the matter.

Mr Wilde (afterwards Lord Penzance) when a Queen's Counsel was a remarkable advocate, with the advantage of a good presence, and unlike many eminent leaders generally took a favourable view of a case before it came on, instead of suggesting difficulties. If he lost the verdict he would say: "We can't always win." On one occasion he adopted a remarkable course with great success. It was an action against a

shipowner for alleged negligent damage to the cargo. The plaintiff, who did not enjoy a very good reputation, had given evidence and been cross-examined at length by Mr Wilde, with the result that it clearly appeared that at all events the claim was grossly exaggerated, and in fact fraudulent, but that did not necessarily preclude the plaintiff from recovering something. When the plaintiff's counsel said in the usual way on the conclusion of the evidence, "That is the plaintiff's case," Mr Wilde, instead of proceeding in the ordinary way to address the jury, repeated, "*That's* the plaintiff's case," and paused. The jury looked puzzled, and Mr Wilde repeated with emphasis, "*That's* the plaintiff's case," and again paused. The jury thereupon began to talk to each other, and for a third time Mr Wilde with increased emphasis said: "THAT'S the plaintiff's case," and paused. The foreman of the jury then got up and said: "My lord, we think there is no case," and thus the defendant had the verdict. Had the trial proceeded the plaintiff would probably have obtained a verdict for small damages, for I

doubt whether our witnesses would have been able to justify the way they had treated the cargo. Chief Baron Pollock, who tried the case, made no remark.

When at the Bar Mr Wilde frequently said he would never accept a judgeship, but he married when in extensive practice as a prominent leader, and then was appointed a Baron of the Exchequer. When reminded of what he had said when at the Bar he replied: "Marriage is, as you know, a revocation of a man's will."

Although Mr Serjeant Byles (afterwards Mr Justice Byles) was a very successful advocate, I do not think he can properly be said to have been a great or a powerful one. Undoubtedly, however, he was most successful. His success was doubtless to a considerable extent due to the close attention he gave to every case. He studied what fell from the judge, and watched with a hawk's eye the countenances of the jurymen in order to gather their impressions. And he closely watched the demeanour of every witness and the conduct of the case by his opponents,

drawing conclusion from any hesitation as to the course they should pursue. I recollect it was said of him that it was a case of fighting with the needle rather than the sword; but however that may have been he was eminently successful. He was, in his day, engaged in practically every case in the Court of Common Pleas, and was generally counsel for the plaintiff, which is, of course, a great advantage. The right of reply was perhaps in those days more important than it is now. Sir George Honyman was in the habit of saying he was prepared to advise that an action for negligence would be maintainable against an attorney who commenced an action in the Court of Common Pleas and did not retain Serjeant Byles. The learned Serjeant seldom left the Court of Common Pleas, but shortly before he was made a judge he was leading counsel in a prosecution in the Queen's Bench, against London Sugar Refiners for alleged nuisance by the use of animal charcoal. The case was tried before Mr Justice Wightman and a special jury. There were a great many witnesses — so many

that each side had to agree to limit themselves to a hundred witnesses. In fact the residents in the neighbourhood of the refinery were prepared in any number to give evidence on one side or the other. The witnesses included several eminent scientific men. One of them, Professor Alfred Swain Taylor, a well-known expert, gave evidence as to the suggested injurious pollution of the air by the process adopted by the refiners. In cross-examination he was asked by Sir Frederick Thesiger whether the air thus polluted was as bad as the air at that time in the Court. The witness at once replied, "Oh, dear no." Mr Serjeant Byles proposed to give evidence of the defendants having on a previous occasion been fined by a Police Magistrate for creating a nuisance. Sir Frederick Thesiger objected to the admissibility of the evidence, but the plaintiff's counsel pressed it. I suggested in a whisper to Sir Frederick Thesiger that the evidence would do us no harm, and that if admitted after it had been objected to, it would probably invalidate the verdict. Sir Frederick Thesiger did not further argue the

point, and the evidence was admitted. The verdict was against my clients, but we obtained a rule absolute setting aside the verdict, on the ground that the evidence objected to was improperly admitted. Our opponents did not proceed further with the litigation which was naturally very costly.

After he retired from the Bench Mr Justice Byles occasionally called on me in the city, as he said to talk over old times. On one of these occasions he said: "It is now forty years ago since I called on old Mr Chitty and said to him, 'Sir, I come to ask you two questions. First, is there any chance of success for a young man at the Bar? And, secondly, could you take me as a pupil?' Mr Chitty replied that he could take me as a pupil, and as to my other question said: 'It is not a matter of chance at all. If a young man is blessed with ordinary abilities and is determined to succeed he will do so. It is not a matter of chance at all.'" Mr Justice Byles added: "For forty long years have I dwelt on what Mr Chitty then said, and I have been convinced of his accuracy in that as well as in other matters."

Lord Justice Lush when at the Bar was undoubtedly an admirable advocate as well as a most estimable man. He was always lucid and clear, and he used to say that many cases were won by the opening, and I think this was so with him. There was practically no danger of his losing a good case, but he was too clear and too straightforward to mystify a jury and appeal to prejudice in a bad case. He was similar in that respect to Lord Justice Mellish. Each had a logical mind. On one occasion I took Mr Lush down to Warwick Assizes on a special retainer. The action was with reference to some contracts for iron. The case for the defence rested mainly on the evidence of the two defendants, one of whom was very ill—in fact dying. When Mr Lush concluded his speech for the defence, Mr Serjeant Hayes (afterwards Mr Justice Hayes), who was second counsel for the defendants, proposed to call the defendant, who was in good health, as the first witness. I objected, and urged that the other defendant should be called, as he could hardly be severely cross-examined, and if he was so,

it would prejudice the jury. Lord Justice Lush took my view, and we obtained the verdict. Counsel for the plaintiff strongly complained and attributed the result to the prejudice in favour of the evidence given by the dying man. The trial ended in the early part of a Friday, sooner than had been anticipated, and as he had not expected to get back to London before the Saturday evening Mr Lush suggested that we should take a little outing, and we according went to Stratford-on-Avon and drove about the country, returning to London on the Saturday night.

It hardly seems credible, but Lord Justice Lush, when at the Bar, told me he had never been in Westminster Abbey, although he had spent a considerable time of his life in Westminster Hall on the opposite side of the road.

One of the most effective speeches I ever recollect at the Bar was made by Mr Stephen Temple, Q.C., of the Northern Circuit, who was by no means a prominent advocate, although he was, I believe, considered a good lawyer. I was concerned for executors against whom an action

was brought to recover a considerable sum on a bond alleged to have been given by the testator to his housekeeper. The testator was said to have been a man of intemperate habits, and the defence was that the bond was improperly obtained. After a long trial the jury were unable to agree on a verdict, and, consequently, the case had to be tried again. Mr Serjeant Byles was counsel for the defendants, and after the first trial he sent for me and suggested that we should amend the pleadings so as to enable the defendants to begin on the second trial, when he proposed to put in the shorthand notes of the evidence given by the plaintiff on the first trial, so that the story being before the jury it could be contradicted by witnesses for the defence. This course was adopted, and it so happened that when, on the second trial, the evidence for the defence had almost been concluded, the judge left for a few minutes in order to speak in another Court to the judge who had presided at the previous trial. Mr Stephen Temple asked Mr Serjeant Byles privately if the defendant's case was nearly over,

Mr Serjeant Byles said it was so, and asked Mr Temple if he intended to call witnesses. He said he must, of course, call the plaintiff. Mr Serjeant Byles suggested that, as her previous evidence had been read to the jury and she must either tell the same or a different story, no good purpose could be answered by calling her. In a few minutes afterwards the defendant's case closed, and, to the astonishment of every one, Mr Temple said he did not call witnesses. It then became, of course, the province of Mr Serjeant Byles at once to address the jury, and in emphatic terms he expressed surprise that his learned friend had not dared to call the plaintiff, who was sitting close to him in Court, and who showed great indignation at not being called. However, Mr Stephen Temple, who had always a melancholy, careworn expression, spoke so feelingly, and evinced such personal distress, saying that he had made the greatest professional mistake of his life, and that if by it his client lost the verdict, he felt he ought to be deprived of the gown he had the honour of wearing. The jury evidently

sympathised with him, and returned a verdict in his favour, which, I believe, would not have been the result if the plaintiff had been subjected to further cross-examination. The earnestness and pathetic tone of the speech influenced the jury, and it is possible the verdict was given rather in favour of the counsel than of the client.

Sir Frederick Thesiger was a very pleasing speaker and popular advocate, but he was timid, and had a great dislike to losing a case, and consequently always wanted to get rid of a case unless he saw his way to get the verdict. I delivered a brief to him and other counsel in an action brought by a well-known firm of stockbrokers against a young man residing with his father, who was a very wealthy man living in London. The defendant was the nephew of a public man. The plaintiff sought to recover about £30,000 in respect of Stock Exchange transactions. The young man had no money whatever beyond an allowance from his father. The father had on a previous occasion paid the same brokers upwards of £20,000 for losses of his son, and in doing so had emphatically

stated that if such transactions were continued he would not pay another shilling. However, within a short period the brokers made a claim of about £30,000, and commenced an action against the son for the recovery of the amount. The father instructed me to defend the action regardless of expense, in order to expose the conduct of the brokers in allowing such a young man to gamble in the expectation that the father would pay losses. Under an order obtained for the purpose I personally inspected the plaintiff's books, but was unable to investigate them fully. It seemed to me, however, that they were not in accordance with the claim, and I instructed Mr Quilter, a well-known accountant, to investigate the accounts, and after a time he reported that the claim was fraudulent. The action proceeded, and I delivered briefs to Sir Frederick Thesiger and two other eminent counsel, and the evening before the day on which the case was expected to come on I had a consultation with counsel. Sir Frederick Thesiger, who had not fully read his brief, said that it was a case which must be referred to

arbitration, and that it would be impossible to go fully into the accounts in Court before the jury. I said that a reference to arbitration would doubtless be the ruin of the young man, inasmuch as it might well be that although many of the transactions were fraudulent some of the items of claim might be enforceable, and that even if the reference only resulted in a small sum being established the father would pay nothing, whereas I did not believe the plaintiffs would face a public trial. Sir Frederick Thesiger still pressed for a reference, but on the following morning he told me he thought my view was quite right. He must have passed a great part of the night in reading the papers, for I found he had in his own neat handwriting written many sheets of notes of the case. The case was not reached on the day anticipated, but four eminent counsel instructed on behalf of the plaintiffs were in attendance in Court the whole of the day, and the three counsel who were to appear at the trial for the defendant were also sitting in Court expecting the case to come on, but it was not reached. On the next day it

stood early in the list, and the same counsel were in Court as on the previous day. I happened to be engaged in a case which was on in the adjoining Court of Common Pleas. After a time my clerk came to me to say that the case to which I have referred was called on, and I at once went over to the Court and found to my surprise that the four counsel for the plaintiffs had disappeared, and that the action was withdrawn. Thus it was evident that the plaintiffs had merely been bluffing; they thought the defendant's father would not allow his son's speculations to be exposed, but they dared not face an exposure of their own transactions which would probably have resulted in their being expelled from the Stock Exchange.

A somewhat remarkable sequel to the foregoing case was that one of the leading counsel for the plaintiffs afterwards consulted me as to his remedies in case (as he was led to suspect) he had not been fairly dealt with by the same firm of stockbrokers. I filled a Bill in Chancery for him, and the defendants settled the matter without allowing the case to go into Court.

CHAPTER XI

PROCEEDINGS IN CHANCERY—PRIVATE BILL LEGISLATION IN PARLIAMENT—ADVOCACY OF COUNSEL AND SOLICITORS

I was engaged in a case in Chancery in which an unusual state of things arose, the result of which was a surprise to the defendant. A manufacturer in America sold his process to my clients, and by deed covenanted not to carry on the business in Europe; but in disregard of the covenant he commenced business in London on a large scale, and used the special process, the exclusive right to use which he had sold. On behalf of my clients I gave notice of a motion for an injunction to restrain the defendant from acting in violation of his covenant, and delivered briefs to Sir Roundell Palmer and other counsel. Lord Justice James (then at the Bar) appeared as leading counsel

for the defendant. The case was to come on shortly before the commencement of the long vacation; but in consequence of an application for the cross-examination of witnesses who had made affidavits, it stood over until the following sittings of the Court. During the vacation, Mr James was made a Vice-Chancellor, and of course had to return his brief. He was appointed to the Court in which the injunction was pending. The defence on which the defendant relied was that the covenant was too extensive, and was thus bad as being in contravention of the rule as to contracts in restraint of trade. This was, of course, a mere question of law. Knowing the great ability and absolute fairness of the new Vice-Chancellor, I did not, as I might have done, apply that the case should be transferred to another judge. When the case was about to come on, my opponent said to me that as I had not asked for a transfer of the case the argument would be a farce, as the Vice-Chancellor had in consultation as counsel before the vacation expressed a very decided opinion in the defendant's

favour. However, when the case came on, the Vice-Chancellor unhesitatingly decided against his former client, and granted an immediate injunction; and when asked to allow the defendant to finish articles, then in course of manufacture, he declined to give an hour, and intimated that the defendant would be committed to prison for contempt if he did not immediately stop the manufacture. The explanation of this remarkable result doubtless was that the merits of the case were undoubtedly with the plaintiffs, and that, when as counsel expressing an opinion in favour of the defendant, he merely thought he might succeed on technical grounds. In consultation on the above case Sir Roundell Palmer expressed an opinion adverse to the plaintiffs, on a ground which surprised the counsel who were engaged with him, and which was not raised on behalf of the defendant. Sir Roundell Palmer said the covenant was not to use the process in Europe, and did not include England.

I might refer to another instance of the absolute independence of a judge. I was engaged in a

case before Vice-Chancellor Stuart. My opponents justified their conduct as trustees by showing that they had acted on the advice of Lord Cairns, when at the Bar. Lord Cairns had become Lord Chancellor shortly before the case came on, but the Vice-Chancellor said he should not regard the opinion of any counsel, and promptly decided in my client's favour.

Vice-Chancellor Malins was, I think, personally popular in the profession, but he occasionally took a strong view, and was sometimes induced to make orders which some judges would not so readily have made. He was often spoken of by Lord Selbourne when Sir Roundell Palmer disparagingly, and Sir Roundel Palmer several times referred to a case in which he was leading counsel for clients of mine. The case arose in relation to some ships built for the purpose of running the blockade during the Confederate War, in respect of which certain mortgage securities had been given. The Vice-Chancellor thought that my clients had acted oppressively, and during the hearing showed a disposition to decide against them. Sir Roundell

Palmer commenced his reply on behalf of the plaintiff by saying he regretted that ten days had been occupied with a case which he considered a very plain and simple case, and that in his opening speech he had mentioned the terms of the decree which ought to be made, and the only decree which could properly be made in that case. The Vice-Chancellor said, "Do you mean by me, Sir Roundell?" Sir Roundell Palmer, "I hope by you, sir. No one but your honour will convince me to the contrary, but assuredly it is the decree which will ultimately be made in this case." Sir Roundell Palmer said this with unusual emphasis, and then continued his speech from ten in the morning until five o'clock. The Vice-Chancellor took time to consider his decision, and ultimately delivered a judgment of three hours' duration adverse to my clients. They, of course, appealed, and on the hearing of the appeal Lord Hatherley said he was astonished to hear that the case had occupied ten days in the Court below He did not think it ought to have taken ten minutes. And the Lords Justices made a decree to the effect desired by

Sir Roundell Palmer directing certain accounts and enquiries in chambers. The Vice-Chancellor, however, was strongly impressed with his adverse view, and gave special instructions to his chief clerk to deal with the matter in a way which would have been prejudicial to my clients. In consequence of this being objected to, the case was put into the paper for the objection to be taken in Court before the Vice-Chancellor. When it was called on the Vice-Chancellor said: "You have some application to make in this case, Sir Roundell." Sir Roundell Palmer who had been specially briefed for the occasion got up and said: "I have no application to make, sir. I have merely to *require* the order of the Lords Justices to be carried out!" He did not add another word, and of course the Vice-Chancellor supported his chief clerk, and my clients had to go to the Court of Appeal, which Court again overruled the Vice-Chancellor. Substantially the same thing happened again more than once in the same case. The result was that enormous costs were unnecessarily incurred, and both parties to the litigation suffered

from the over-zeal of the judge in promoting the view he had formed as to what would be proper irrespective of the legal rights of the parties. The system which enabled a suitor practically to select the judge was no doubt open to objection, but it was certainly occasionally useful in applications to a judge in Chancery, notably Vice-Chancellor Malins, who would generally be disposed to make an order right in itself without raising difficulties as to the strict regularity of the proceeding. Thus he was certainly a very useful judge.

Many, if not most, eminent judges are generally believed to have predelictions as to the application of different principles of law, and thus it was formerly frequently the case, and sometimes happens now that the constitution of the tribunal foreshadows the probable decision. Sir George Jessel once told me that in a case in which he was briefed to argue for the appellant in the House of Lords from a decision of Lord Cairns he found to his disappointment that Lord Cairns would preside at the hearing of the appeal. Sir George Jessel said he told his client that the

case was hopeless, and that nothing he could say would really prejudice it, and consequently asked permission to say what he liked. I had nothing to do with the case, but Sir George Jessel said that in opening the appeal he began by saying it was an appeal from a judgment which, if it might not be thought disrespectful, he should call *absurd*. As Sir George Jessel anticipated, Lord Cairns naturally resented this, and the result which Sir George Jessel anticipated followed.

Sir George Jessel was undoubtedly a strong and able advocate, but he did not always strive to make himself agreeable. In the case of *Bain* v. *Fothergill*, he began by saying it was an appeal from a decision based on what was called judge-made law. He denied that there was any such law. Judges had certain powers, but they were not legislators, and had no power to make law. Sir George Jessel was not a man easily discomfited, but I recall an instance in which he was much so. I was acting for the plaintiffs in a suit being heard before Vice-Chancellor Bacon. Mr Kay (afterwards Lord Justice) was counsel for

my clients. The bill was a very voluminous one —more so than was common even in those days. Sir George Jessel was counsel for the defendant, and began his speech for the defence by a strong complaint that at the hearing much reliance had been placed on the part of the plaintiffs on a view of the case which was not raised by the pleadings; that that was a tricky practice which had become common, and he protested against it, and said that when he attacked a solicitor he did not like to attack an unknown one, and went on in that strain referring to me in complimentary terms, but complaining of the course he suggested I had adopted. At the commencement of this attack, Mr Kay whispered to me, "Sit still—for God's sake; don't say a word. Let him go on." When Mr Kay came to reply, he pointed out a paragraph in the Bill which distinctly raised the question which Sir George Jessel had complained was put forward for the first time at the hearing, and which paragraph he had evidently overlooked. When this was pointed out the result greatly amused Mr Kay, for Sir George Jessel turned

very red and was manifestly confused, and half apologised—in fact, did not know what to say. It was not an extraordinary mistake for a busy advocate to make, for the pleadings were very long and complicated, but it was unfortunate that it should have been made the occasion of a deliberate attack, although a good-natured one.

The late Mr Benjamin, Q.C., was without doubt a distinguished and very forcible advocate, and altogether his career was an extraordinary one. He, on several occasions, related to me his escape in an open boat on the conclusion of the Confederate War, and his arrival in this country to begin life again after successful professional experience in the United States. I was introduced to him shortly after he became a member of the English Bar, with reference to a suit in the Court of Chancery instituted by the American Government against the agents in this country of the Confederate Government, with respect to the expenditure of the large amount raised in Europe by the issue of Confederate bonds, and it was naturally suggested that Mr Benjamin, as a friend

of those interested, should hold a junior brief. The case came on for hearing before Lord Justice James, when Vice-Chancellor, and it appeared to be generally thought that, as usual at the time, a decree would be made directing enquiries in chambers. The matter was being so dealt with when Mr Benjamin, then unknown to any one in Court, rose from the back seat in the Court. He had not a commanding presence, and at that time had rather an uncouth appearance. He, in a stentorian voice, not in accord with the quiet tone usually prevailing in the Court of Chancery, startled the Court by saying, "Sir, notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr Kay, if, sir, you will only listen to me—if, sir, you will only listen to me (repeating the same words three times and on each occasion raising his voice), I pledge myself you will dismiss this suit with costs." The Vice-Chancellor and Sir Roundell Palmer, and indeed all in Court, looked

at him with a kind of astonishment, but he went on without drawing rein for between two and three hours. The Court became crowded, for it soon became known that there was a very unusual scene going on. In the end the Vice-Chancellor did dismiss the suit with costs, and his decision was confirmed on appeal. Mr Benjamin very soon acquired an extensive practice, and in due course applied for silk, but Lord Hatherley, who was Lord Chancellor at the time, instead of making him a Queen's Counsel, gave him a patent of precedence. Mr Benjamin was disappointed. Lord Hatherley told me he had not made him a Queen's Counsel, as he thought it might not be approved in America. I ventured to suggest that, on the contrary, I thought it would be popular there, and ultimately Mr Benjamin was made a Queen's Counsel.

The style of advocacy of the late Mr Pope, Q.C., was in strong contrast to that of Mr Benjamin. Mr Pope was always calm and conciliatory, and usually expressed himself in very clear and plain language. He was a great

admirer of Mr John Bright, and as I always thought, sought to follow his style of speaking; possibly also that of Mr Hope Scott, another celebrated Parliamentary advocate. There was, I think, a general feeling of regret that Mr Pope practically confined himself to Parliamentary business—for all who knew him well recognised that he had the qualifications for an eminent judge. The general severance of counsel practising before Parliamentary committees appears to be now much more complete than was formerly the case. I have had occasion recently to refer to old proceedings before committees and found the names of Lord Chief Justice Cockburn, Lord Esher, Mr Justice Mellor and Mr Justice Keating occurring, as well as those of other advocates prominent at the time in the Common Law Courts.

Some years ago (I think in the year 1885) the House of Lords adopted a somewhat extraordinary course. A Bill had been introduced into that House by a private member in relation to the London Water Companies. The Bill was referred to a special committee. The Water

Companies desired to appear before the committee by counsel. The House of Lords would not allow this, but after discussion in the House, gave them permission to appear by a representative *not being a barrister-at-law.* Thus there was no provision that the representative should be in any way competent, and the most competent representatives were excluded. The only explanation I ever heard was that it was thought that if counsel appeared the proceedings would be prolonged. I was instructed to appear for the eight Companies, and was treated by the committee with the utmost courtesy. The proceedings before the committee lasted seven or eight days, and were printed in a Blue Book. The committee greatly modified the Bill in the way desired by the Companies, but, owing to the Dissolution of Parliament, the Bill did not proceed in the House of Commons.

The House of Lords adopted a similar course in, I think, the next session, when I again appeared before the committee on behalf of the Companies. I am not aware that, with these

exceptions, such an unusual and unsatisfactory course has ever been adopted.

The proceedings in the House of Lords are in some respects rather extraordinary. There was an instance of this in the session of 1902, when the Metropolitan Water Act was referred to a Joint Committee of Lords and Commons. The committee consisted of eight members—four nominated by each House. After the Bill had been before the committee for several days the committee, by a majority, passed a Resolution, which was deemed by the promoters fatal to the Bill. There were seven members of the committee present when this Resolution was passed, the chairman voting in the minority. On a subsequent day when the eight members were present, the chairman of the committee moved that the previous Resolution should be adhered to. Four members voted against that Resolution, and four in favour of it. The result according to the practice of the House of Lords, was that the previous Resolution was practically rescinded. Had the chairman moved that the Resolution

should not be adhered to, which, of course, was what he desired, the previous Resolution would have been confirmed. In like manner, on subsequent occasions, instead of moving that the Bill or provisions in it should be approved, by moving in the form of disapproval the result was approval, the committee being equally divided. As may readily be supposed this state of things puzzled many who were not acquainted with the peculiar practice of the House of Lords when the numbers voting are the same on each side.

The Parliamentary system in respect to private legislation can, I think, hardly be considered satisfactory. It would perhaps be difficult to suggest any feasible change of tribunal with respect to really important Bills in relation to large undertakings, but the system is manifestly too elaborate and costly for many cases in which it is necessary or desirable to obtain Parliamentary powers, although the object may not be one of much general importance. Beyond doubt many who have reasonable grounds for objecting to a Bill, abstain from petitioning because doing so

would involve them in expense greatly out of proportion to their pecuniary interest in the matter. But also as respects very important Bills there seems room for improvement. The whole contentious work of the year is now confined to a few weeks, with the result that there is frequently much confusion. This concentration of the business seems to arise from the rule that a Bill must be introduced for a particular session, and if it does not pass in that session it drops. As respects a large proportion of the Bills which are introduced, there is really no urgency. Indeed, it seems to have become more and more the practice for promoters to obtain Parliamentary powers, and then to allow them to remain dormant, or to use them as a species of blackmail, or as an obstacle to more powerful or more wealthy parties obtaining powers for a similar undertaking. If private Bills could be introduced—of course after due notice—at any period of the session and put in a list to be dealt with in order, either in that session or the next, there would cease to be the rush which now exists as well before the

examiner on standing orders as before the Committee. The business might be fairly distributed throughout each session, without inconvenience to any one, and without the necessity for any change in the standing orders, except in so far as those orders are inconsistent with such a distribution of business.

The practice of Parliamentary Committees with respect to shorthand notes contrasts very favourably with that of the Courts of Law. The Committees recognise the presence of the shorthand writer, whereas in the Courts he is ignored. Thus before a Committee, if the shorthand writer does not clearly understand what a witness has said, he asks him to repeat it, and the Committee frequently ask the shorthand writer to read from his notes a previous answer. No doubt the Parliamentary system is very costly, but in all really important cases in the Courts the parties take shorthand notes at quite as great expense. It is to be borne in mind that the cost of taking the notes is very trifling, the expense is in transcribing and

subsequently copying the notes, and, if there were an official shorthand writer in each Court, it by no means follows that the notes would be transcribed in every case, and in many cases it would suffice to transcribe part of the notes. If transcribed they would, as they are in notes of proceedings before Committees, be accurate, which is by no means always the case when notes are taken in the Courts of Law. Indeed, it occasionally happens that different shorthand writers are employed by the respective parties, and that the notes differ. I recollect a case which was tried at the Guildhall before Chief Justice Erle, and afterwards argued before the Court of Common Pleas at Westminster. The plaintiff desired to appeal to the Exchequer Chamber, and a draft case was prepared in the usual way, but the notes differed, and the Chief Justice could not read his own notes. There were several attendances before him, and he lent us his note-book, but all to no purpose; the appeal could not be proceeded with, although the case raised a question of Marine Insurance

Law and is frequently cited as an authority. When it was suggested at the Judicature Commission that there should be an official shorthand writer in each Court, Sir William Erle objected, saying that shorthand notes were so painfully accurate!

In my earlier days there was considerable discussion on a painful subject in relation to a member of the Bar who then, or at all events subsequently, held deservedly a very prominent position as a leading lawyer. Under absolutely inconceivable circumstances he committed an act of gross impropriety, but one in no way connected with the profession. The question whether he should be disbarred was solved by the remarkable compromise that he might remain a member of the Bar but should not be allowed to practice in Court. This condition was never removed, but he enjoyed a very large and lucrative chamber practice, and frequently attended summonses before the Judges in Chambers, and held numberless briefs in important compensation cases and before arbitrators, and his opinion on

cases was generally considered as entitled to great weight. He suggested the form of security known as Lloyd's bonds, which at one time held an important position in financial circles, and to some extent still do so, but are not, I believe, appreciated by bankers and others so much as formerly. In fact they were in many instances unjustifiably issued. But the position of the gentleman referred to was certainly peculiar, and, I believe, unprecedented. I was engaged in an action which was referred to the late Mr Justice Denman when he was a junior barrister. My opponents, a leading firm of solicitors, briefed the barrister referred to, but the arbitrator refused to hear him, and there was in consequence considerable commotion. He was a director of several important companies, and had many personal friends, and was beyond doubt a very agreeable and most intelligent companion.

It will be seen that the position as respects advocacy of this barrister was precisely the same as that of a solicitor. It would have been competent for a solicitor to act professionally

to the same extent and in the same way in all respects as he did, the only difference being that he could not, as the solicitor could, receive instructions direct from the litigant, but had to be employed through a solicitor. This tends to show that the fusion often spoken of between the two branches of the profession would not have so much effect as some seem to anticipate. Beyond doubt such a change would be financially disadvantageous to each branch; but the recent changes as to the jurisdiction of the County Courts, and the further extension which seems likely to follow, will, I think, make some modification of the existing state of things inevitable. Local Bars, which have of late years greatly increased in number, will probably do so even more rapidly than they have hitherto done, and the Bar will have to compete with local solicitor advocates equally competent, and will be fettered by being unable to act unless instructed through a solicitor. This will probably be complained of not only by counsel, but by litigants, and others who may desire advice. It is true that in the County

Courts the solicitor can only properly appear as an advocate when he is actually the solicitor in the case, he is not allowed to do so when instructed through another solicitor; but this restriction is easily evaded, and I believe constantly is so. At all events it is an undesirable provision, for it acts very prejudicially to suitors and often causes useless expense, inasmuch as the solicitor in the case may reside at some distance from the place at which the County Court is held, and if he cannot depute a solicitor there to act for him, he has to go there himself. Thus it seems desirable that the local Bar and solicitors attending the Court should be equally unfettered. It is no doubt of supreme importance that in the High Court advocacy should be in the hands of fully competent and experienced advocates; otherwise much confusion, irregularity, and waste of time would ensue. It would, however, be by no means impossible to secure this. Within living memory Serjeants were alone heard in the Common Pleas — and in the Admiralty and Ecclesiastical Courts the right

of audience was restricted. No one would, I should think, desire to revive that state of things; but at the present day the privilege is not in the highest tribunals (*i.e.*, the House of Lords and Privy Council) confined to members of the English Bar. It is of almost daily occurrence for advocates of the Scotch and Irish Bars, and for Colonial advocates who are acting in the litigation as solicitors as well as barristers, to appear and argue important cases.

In heavy and complicated contentious business the present system works well. It would often be impossible for a solicitor in large practice to get up a case efficiently if he had also the responsibility of conducting it. It is of manifest advantage to the advocate and thus to the suitor as well as to the tribunal, that, so to speak, the wheat should be sifted from the chaff. Clients often deluge their solicitor with a flood of irrelevant matter. No prominent advocate would care to have a costly office establishment of clerks. On the other hand, experience

shows that solicitors in cases of importance do not usually act as advocates when it is competent for them to do so, as in arbitrations, bankruptcy proceedings, and in the police courts, etc.

CHAPTER XII

LAND TRANSFER—LIMITED LIABILITY—STATUTE OF FRAUDS

ALTHOUGH the changes in the mode of conducting business in the Courts have in my time been very startling, they are not more so than those with respect to the transfer of land. In my early days when land, however trifling the transaction might be, was sold, two deeds were prepared; one, a lease for a year to the purchaser of the property agreed to be sold, and the other a deed of absolute release. Moreover, in the most ordinary cases, it was not uncommon for Abstracts of Title of enormous length to be delivered, involving the examination of voluminous documents, and extending back for a very lengthened period. No doubt difficulties of title still arise, but there has in

practice been a great improvement in this respect. This is not the place to enter into a discussion on the vexed question as to registration of titles under the recent Act, but beyond doubt so far as that Act has been in operation it has caused delay and increased expense in the transfer of landed property. Indeed, it is a popular error to suppose that there is any difficulty in the conveyance of land—in fact it is easier to transfer it than it is to transfer Consols or Debenture Stock of the London and North-Western Railway Company, or any other like security. The owner of a house in Lombard Street may sell it for one hundred thousand pounds or more, and in five minutes or less time effectually convey it to a purchaser by a piece of paper the size of his hand. The purchaser will have a complete and absolute title against all the world, and the whole thing may be done in five minutes. The only difficulty is that the vendor may not have a valid title, and if he has not, the purchaser may lose the property and his money without having any redress. The cases in which land is sold or offered for sale

without any title are extremely rare, but it is not so exceptional for some undisclosed encumbrance or charge to exist. It is difficult to understand why in this respect the purchaser of land should be in a worse position than the purchaser of personal property. It seems obvious that if a man sells land to which he is not entitled, or which is encumbered, he ought to repay the purchase money, or remove the encumbrance. If this were the law, difficulties as to title would in most cases disappear. If a man buys a picture or a racehorse for ten thousand pounds of a well-known nobleman or other wealthy person, he pays his money, takes the property, and asks no questions, and he has his remedy in case of difficulty arising; if he buys a cottage say for five hundred pounds, his solicitor investigates the title often at great cost and with much delay, and this is necessary, because, when land is bought and the title proves defective, the purchaser has no redress, whereas, if he had the same redress as in the case of the picture or racehorse, any such investigation would be unnecessary.

Thus in a large proportion of the transactions in land, the purchaser would be content if he had redress in case the vendor had not power to sell, and an investigation of title would be unnecessary; and any system of registration (which must necessarily be attended with more or less expense) might be optional. The advocates of compulsory registration do not seem to realise the necessity it involves of accurately defining boundaries. It is easy to describe some properties, say No. 1 Fleet Street, but it is extremely difficult to define the exact boundaries of a large estate in the country consisting perhaps of several thousand acres; in fact the owner does not know the precise limits, and any attempt to settle within an inch or two where one property ends and another begins, must lead to trouble and probable dispute; whereas, without attempting any minute definition, difficulty seldom arises in practice, and it is not often necessary to consider the rights of adjoining owners with respect to every hedge and ditch. But for the purpose of registration of title, these rights must, of course, be defined;

and this in a large country estate would always entail much trouble and expense, and frequently dispute.

Great as changes and improvements in other respects have been, they perhaps (as respects the wealth of the country and advantage to the general community) sink into comparative insignificance when contrasted with those in relation to Joint Stock Companies. Until the year 1844, Companies could only be formed by Royal Charter, by private Act of Parliament, or by Deed of Settlement. It is hardly necessary to notice the relatively few Companies formed in Cornwall on the cost book principle which can hardly be considered a satisfactory one. A Charter could only be obtained under exceptional circumstances, and with much delay and expense. A private Act of Parliament was open to the same difficulties as a Charter, and was, moreover, only suited to undertakings of a public nature. Thus, practically, Companies for trading purposes could only be formed by a cumbrous Deed of Settlement, which deed had to be signed by each

shareholder; and it was generally necessary to obtain a private Act of Parliament, enabling the Company to sue in the name of one of its officers, in order to avoid the necessity of making every shareholder a party to the action. Some slight improvement was effected by the Act of 1844, but the proceedings under that Act were very inconvenient and costly, and it left each of the shareholders in the position of being liable for the whole of the debts of the Company, however small his interest might be. I was concerned in a case in which a large landed proprietor and wealthy man took one share of five pounds in a Company, because he thought the project was calculated to benefit his tenants. He afterwards surrendered his share, but, many years after he had done so, it was decided by the House of Lords that he was liable for the whole of the debts of the Company, and he had, I think, to pay about eighty thousand pounds. It is, I think, difficult to conceive anything more unjust than the English law of partnership. Lord Bramwell used to say, "A. agrees to sell goods to B., and intends B.

and B. only, to be his debtor. In like manner, B. intends that he alone shall be liable. If, however, B. is unable to pay, and A. discovers that C. had a trifling joint interest in B.'s purchase, A. can congratulate himself on the discovery and make C. pay the whole of the debt, although it was not intended by either of the parties that there should be any such liability." After the Act of 1844 was passed there was much discussion as to the suggestion that the liability of shareholders should be restricted to the amount of their respective shares, and at the request of Lord Bramwell I gave evidence before a Committee of the House of Lords on the subject. Lord Overstone, formerly Mr Jones Lloyd, and head of the banking firm of Jones Lloyd & Co., afterwards acquired by the London & Westminster Bank, was strongly opposed to the introduction of limited liability, but, after much discussion it was adopted with respect to Companies other than banking and insurance Companies. It was not until the year 1862 that it was made general. No doubt there have been

cases in which the Act has been abused, and it has been applied to many cases to which it is not suited, but this has often arisen from the natural desire to avoid the unjust law of partnership, as respects the liability of every one having an interest in the undertaking; and although it would be better in many private and small cases to carry out what is desired in a less cumbrous way, the Act has given the relief sought. No one can, I think, doubt that the Act has added greatly to the nominal wealth of the country, and has been very beneficial to a vast number of persons. I could, in my own experience, instance many cases in which a prosperous man of business has been able to convert the profits of his business into capital, when, without registration the business would have died with him. This has not only resulted in benefit to his family, but the profits of the business have been preserved and made available for those who have subscribed for shares. Moreover, competent clerks have in many cases been enabled to continue a business for the joint benefit of a

retiring principal and themselves, with capital left in the business for that purpose. It may be said that this could have been done under the Act known as Bovill's Act, but the working of that statute was in my experience very unsatisfactory. Indeed, I have for a long time declined to prepare agreements under it. When it was proposed to apply limited liability to banks, it was strongly urged that it would lessen the security of the customers, but beyond doubt the reverse has been the case. In former days inspection of the list of shareholders in many leading Joint Stock Banks showed that a large proportion of the shareholders were women; the explanation often being that the real owner of the shares had registered them in another name, with the view of avoiding unlimited liability, and few men of known wealth appeared as shareholders. Now it is quite otherwise. Wealthy men do not hesitate to hold shares because there is the bare possibility of considerable liability, provided they know the extent of it, and that it cannot be ruinous to them. Thus the uncalled capital now forms a

real security to the customers, whereas formerly it was deceptive.

Great as is the need in my view of alterations in the arrangements for the administration of justice, especially in the provinces, the desirability of amending the law itself in some respects is perhaps even more important. Few who are not lawyers are disposed to believe that in a country, supposed to be a commercial one, the law can be so inconsistent as it is with regard to some transactions of everyday life. For instance, a man may go into a shop and agree to purchase an article, say for twenty pounds, and desire it to be sent to his house; but when it arrives, without even suggesting any justification for so doing, he may with impunity refuse to receive it, and if sued, may go into Court and say to judge and jury, that although he has the money in his pocket, and although he has no excuse for not fulfilling the bargain he admits he made, they must decide in his favour. In my experience large pecuniary loss has been sustained, and great injustice done by reason of the requisite written evidence of a

contract being unobtainable in consequence of a slight variance between brokers' bought and sold notes, or ambiguity in correspondence or other like cause, enabling an unprincipled buyer or seller, as the case may be, to get out of a transaction which he has no just ground for refusing to carry out. The only excuse made for such a state of the law is that if a memorandum in writing were not requisite there would be perjury. But although this law applies, as I have said, to transactions of everyday life, often of little pecuniary importance, the law is otherwise with respect to transactions which are sometimes of great magnitude. For instance, a man without any writing, may by word of mouth authorise another to buy or sell for him property to any amount, and he will be bound. He may enter into a general or limited partnership, and thereby become involved in ruinous liabilities without any written evidence. He may charter a ship or agree to pay thousands for the freight of it, and judge and jury may have to decide whether the conversation which passed

amounted to a complete bargain. Numberless other instances might be given of the inconsistency of the law; and every lawyer is aware of the injustice resulting from it, and of the endless litigation which has arisen from laudable endeavours on the part of the Courts to defeat attempts to escape by reason of it a just liability. There are, in fact, many matters affecting business transactions which call for legislation, but in these days it seems to be impossible to obtain the attention of Parliament to any matter which does not involve political controversy.

CHAPTER XIII

PERSONAL

In the foregoing notes, I have for obvious reasons omitted mention of any one now living or who has recently died. It would have been impertinence had I not done so. Moreover, I have not of late been so constantly in the Courts as was formerly the case, and consequently I could not to the same extent speak from personal observation. I have also abstained from reference to many interesting cases in which I have been professionally engaged. I could narrate several cases of an extraordinary and interesting character which would have shown that sometimes truth is stranger than fiction; but there is always danger in reviving what is past, or of saying something distasteful to those who are living, or to the

relatives of those who are not. Thus, these notes must necessarily be disappointing. Although the greater number of the actions in which I have been engaged have related to mercantile, shipping, and insurance business, of no interest to any one except the litigants, I could recount several sensational and extraordinary cases, some of which from that very cause did not go into open Court.

I ought, perhaps, to add a few words as to my own professional career. Not that it can be of general interest, but, so far as it may be considered a successful one, it may operate as an encouragement to those whose professional life is commencing. When I came to London, I did not know a single person in the City of London. I had a very moderate patrimony, sufficient to keep me from borrowing. I had no advantages of any kind. I married at the age of twenty-four, which might well be considered an imprudent act. I was, and had always been, in delicate health. I tried in vain to insure my life, and, in fact, for several years my own belief was that

I should not live to see another year. I was threatened with a disease from which my father prematurely died, and which had been fatal to my only brother and three of my sisters. Thus I was on the one hand compelled to work hard, and on the other to be abstemious and temperate. My own belief is that work, thought to be carried to an imprudent extent, really prolonged my life. I devoted the whole of my time to my profession—never speculated or sought to make money in any other way. I never applied for a share in any Company, and have never sold any investment I had once acquired. With very few trifling exceptions I have never lent money at interest, either with or without security. With one trifling exception I have never been surety for any one, and have never acted in the promotion of a Company except professionally. All this doubtless sounds very selfish, but it had the advantage of enabling me to devote my time and thoughts to the professional work I had in hand, and this has doubtless to a great extent contributed to such professional prosperity as I

have had. But beyond doubt that success is due to my having had the good fortune to have on many occasions the services of the most eminent members of the Bar, and having thus acquired most valuable guidance. I in particular recall, with much gratitude, the kindness of Sir James Shaw Willes, who, when I was very young, would keep me at his chambers discussing legal principles, and when thanked for doing so, said that it gave him pleasure. I feel I owe much to Chief Justice Jervis, although he knew little of me personally before he became Chief Justice. As I have already mentioned, he frequently, when presiding in Court, went out of his way to say kind things to, or of, me without, so far as I knew, anything to call for them. Lord Bramwell was a most valued friend to me when he was a member of the Junior Bar and I was very young, and he continued to be so until his death. The Common Law Commission was formed about the year 1851, and reported in 1852. Doubtless at the instigation of Lord Bramwell and Mr Justice Willes (both were

members of the Commission) I was applied to for my views, although at that time I had had but comparatively little personal experience. I was on several subsequent occasions requested to give evidence before Parliamentary Committees of each House as to contemplated changes in the law. When I was under the age of forty I was offered the appointment of Solicitor to the Admiralty, then a distinct office said to be worth two thousand pounds a year, with little work; but I, perhaps imprudently, declined it. I was also asked more than once if I would accept the office of Chief Clerk in Chancery.

In 1867 I was appointed a member of the Judicature Commission, which, it is hardly necessary to say, comprised most of the leading judges and advocates of the day. I was the only London solicitor who was a member of the Commission, and I have for some time been the only surviving member of it. Three Lord Chancellors were members of the Commission. The sittings of the Commission extended over a period of seven years, and great attention

was given to the subject, particularly by Lord Selborne, Lord Justice James, and Mr Justice Quain. In his published *Memoirs* Lord Selborne has very kindly, but I fear undeservedly, referred to me by name as having rendered valuable assistance to him.

I some time afterwards served as a member of the Royal Commission appointed to enquire into the usages and constitution of the Stock Exchange; of which Commission Lord Penzance was Chairman, Lord Blackburn, Lord Rothschild, the Chairman of the Stock Exchange, and other prominent public men being members.

In the year 1881 I was appointed by Lord Selborne (then Lord Chancellor) a member of an important Committee to consider further suggested changes in the business of the Courts. The late Lord Coleridge (then Chief Justice) was Chairman of the Committee, Lord Justice James, Lord Hannen, Lord Herschell, Lord Bowen, Lord Shand, Lord Justice Mathew, and others being members.

I was subsequently appointed a member of

a small Committee, of which Lord James of Hereford, Lord Bowen, and others were members, to enquire into the mode in which the business was carried on in the office of the Public Prosecutor and Treasury Solicitor.

In the year 1894 I was appointed by Lord Herschell (then Lord Chancellor) a member of a Committe to consider the wording of the Joint Stock Companies Acts and suggested amendments. Lord Davey was Chairman of the Committee and Lord Justice Chitty, Lord Justice Vaughan Williams, Mr Justice Buckley, Mr F. B. Palmer and others were members. The result was the passing of the Act of 1900; not in exact accordance with the recommendations of the Committee, and not, I fear, in some respects with quite satisfactory results.

I was elected a member of the Council of the Law Society in the year 1866, and have for some time been the senior member. In the year 1902 my colleagues most kindly, at their own expense, had my portrait painted by an eminent artist, and hung in the Hall of the

Society. In the year 1882 I was appointed a deputy-lieutenant for London, and in the year 1895 a magistrate for the County of Kent. I have several times been asked to be a candidate for Parliament, but I have always abstained from taking any active part in politics.

On the 8th November 1902 I received in the country, to my utmost surprise, the following letter :—

10 DOWNING STREET, WHITEHALL, S.W.,
7th November 1902.

MY DEAR SIR,—It is with great satisfaction that I find myself authorised to inform you that His Majesty has graciously signified his intention to confer upon you the honour of Knighthood on the occasion of his birthday. Yours faithfully,

ARTHUR JAS. BALFOUR.

JOHN HOLLAMS, Esq.

Before the receipt of this letter I had not the slightest notion that anything of the kind was contemplated, and nothing whatever had been said or hinted to me on the subject.

The distinction thus conferred was followed by an overwhelming and wholly unprecedented one, viz., a dinner in my honour, at which the Lord Chancellor most kindly presided, and at which Lord James of Hereford, and nearly all the judges of the Supreme Court, and the Attorney-General and leading advocates were present. It was indeed a most truly gratifying occasion. I most sincerely wish I could feel that I had done anything to merit such an unexampled testimonial.

Thus I have indeed much to be thankful for. I have received numberless kindnesses from judges, counsel, and solicitors, as well as from clients. I have never had a serious personal difference with any one, and have never been a party to a law suit. I may be said to have been fortunate, but I believe that the road to such success as I have had is open to any young man entering the profession who may choose to follow it, and devote himself to legitimate professional work, and abstain from money-lending, company promoting, financing builders, and

speculative business, and give constant, careful and anxious thought and attention to the professional business from time to time entrusted to him.

INDEX

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